91-1487

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES,
and d/b/a ARCADIA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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March 10, 1992

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QUESTIONS PRESENTED

Section 110(5) of the Copyright Act provides a limited exemption from copyright infringement liability for the public reception of a transmission of a copyrighted work (*e.g.*, a radio broadcast) on a single receiving apparatus of a kind commonly used in private homes where no direct charge is made and the transmission is not further transmitted to the public.

At issue in this petition is whether the United States Court of Appeals for the Seventh Circuit erred by holding that Section 110(5) exempts a national corporation which systematically purchases and professionally installs multi-speaker equipment at 669 stores, and who further transmits radio broadcasts of copyrighted works to the public from one room to another room. The specific questions raised by the Court's decision and this petition are:

1. Whether the Seventh Circuit erred by imposing on the copyright owner the new burdens of proving that the Section 110(5) exemption does not apply by showing that the alleged infringer is acting like a broadcaster and receives more than a minimal benefit from the infringing activity;

2. Whether the Seventh Circuit erred by judicially broadening Section 110(5) to exempt a person's use of more than a "single receiving apparatus" by analyzing the use of each receiving apparatus in isolation rather than in the aggregate, and by ignoring all precedent and Congressional intent to limit the exemption to small businesses; and

3. Whether the Seventh Circuit erred by rejecting all precedent and interpreting the "further transmission" language of Section 110(5) as depending upon the receiver's capabilities instead of the alleged infringer's use of the transmission after it is initially received.

PARTIES TO THE PROCEEDINGS

Broadcast Music, Inc., and the following songwriters and music publishers that it represents, are all Petitioners in this Court:

Virgin Songs, Inc.;
Irving Music, Inc.;
Stone Agate Music, Division of Jobete Music Co., Inc.;
Michael Joe Jackson d/b/a Mijac Music;
Dick Griffey d/b/a Hip Trip Music Co.;
Kear Music, a division of La Face, Inc.;
Hidden Pun Music, Inc.;
Neal Schon, Gregg Rolie, Ross Valory, Aynsley Dunbar, a Partnership d/b/a Weed High Nightmare Music;
Foreign Imported Productions and Publishing Inc.;
Aurora Productions, Inc., James L. Stewart and Richard H. Irvine d/b/a Aurora Film Partners Music;
John Cafferty, Jr., d/b/a John Cafferty Music;
Man Woman Together Now Inc.;
Bonnie Bourne d/b/a Murbo Music Publishing;
Dick James Music, Inc.;
Screen Gems-EMI Music, Inc.;
Michael Jackson d/b/a Maclen Music;
Richcar Music Corp.;
Samuel J. LeFrak as individual and trustee, Ethel LeFrak as individual trustee, Richard S. Lefrak, Samuel J. LeFrak as individual, Francine LeFrak and Herbert Moelis, a Partnership d/b/a Saja Music Company;
Stevie Hill d/b/a Myat Publishing;
Unichappell Music, Inc.;
Felice Bryant d/b/a House of Bryant Publications;
S.K. Music, L.P. and Fujipacific Music (USA), Inc. a Joint Venture known as Windswept Pacific Entertainment Co. and d/b/a Longitude Music Co.;
Warner-Tamerlane Publishing Corp.;
Chevis Publishing Corp.;
Al Gallico Music Corporation (EMI Al Gallico Music Corp.);
Pink Floyd Music Publishers, Inc.;
Bill Graham d/b/a Grajonca Music (Estate of Bill Graham);

PRI Songs, Inc.;
Anita Pointer d/b/a Anita Pointer Publishing;
EMI Blackwood Music Inc.;
Richard Perry d/b/a Braintree Music;
June Pointer Whitmore d/b/a Leggs Four Publishing;
Ruth Pointer d/b/a Ruth Pointer Publishing;
Trevor Lawrence d/b/a Til Dawn Music;
EMI Unart Catalog, Inc.;
Ensign Music Corporation;
Sebanine Music, Inc. (Budde Songs, Inc.);
Shannon Rubicam and George Robert Merrill, a Partnership d/b/a Boy Meets Girl Music;
Al Green Music, Inc.;
Kim Wilson, Jimmie Lawrence Vaughan, Francis Anthony Christina, Preston Hubbard, a Partnership d/b/a FAB Bird Music;
Towser Tunes, Inc.;
ABKCO Music, Inc.;
Careers Music, Inc. (Careers-BMG Music Publishing, Inc.);
Melody Trails, Inc.;
Derringer Music, Inc.;
Jay Ferguson d/b/a Painless Music;
Alley Music Corp.;
Trio Music, Inc.;
Wheatley Management Services d/b/a American Tumbleweed Music;
Conrad Music, a division of ARC Music Corp.;
Warren T. Parker, Jr., George R. Davis, Jr. and Alvin O. Tyler, a Partnership d/b/a OLRAP Publishing Co.;
Mick Fleetwood, John McVie, Christine McVie, a Partnership d/b/a Fleetwood Mac Music (NEM Entertainment Corp. d/b/a Fleetwood Mac Music);
Martha Emily Davis d/b/a Clean Sheets Music;
Muscle Shoals Sound Publishing Co., Inc.;
Jondora Music;
Vince Neil Wharton, Nikki Sixx, Robert Deal and Tommy Bass, a Partnership d/b/a Motley Crue Music Company;
Nikki Sixx d/b/a Sikki Nixx Music;

Mick Mars d/b/a Mick Mars Music;
Frederick S. Bienstock, Hammerstein Music & Theatre Company, Inc., Dorothy F. Rodgers, and Murray Cohen as Trustees under Dorothy F. Rogers 1983 Trust Agreement, a Connecticut partnership d/b/a Edward B. Marks Music Company;
Daryl Hall and John Oates, a Partnership d/b/a HOT-CHA Music Co.;
Island Music, Inc.;
Dean Esposito a/k/a Dino Esposito d/b/a ONID Music;
Blackbyrd Productions, Inc. d/b/a Blackbyrd Music; Saturday Music, Inc.;
Robert Gaudio and Frankie Valli, a Partnership d/b/a Seasons Four Music.

Petitioner Broadcast Music, Inc. has no parent companies, but the following are parent companies of one or more of the other Petitioners:

Virgin Music, Inc.;
Virgin Holdings, Inc.;
Stone Diamond Music Corp.;
Jobete Music Co., Inc.;
Motown Record Co.;
Polygram Leisure Ltd.;
Polygram Corp.;
Songs of Polygram International, Inc.;
Polygram N.V.;
EMI Technology, Inc.;
Thorn EMI plc.;
Capital Industries-EMI Music, Inc.;
Thorn EMI North American Holdings;
Warner-Chappell Music, Inc.;
Warner Bros. Inc.;
Time Warner, Inc.;
EMI Copyright Holdings, Inc.;
Pink Floyd Music Publishers, Ltd.;
Polygram Records, Inc.;
Catparco, Ltd.;
Entertainment World Music, Inc.;

Screen Gems-EMI Music, Inc.;
Paramount Communications, Inc.;
Jastian Music, Inc.;
ABKCO Industries, Inc.;
BMG Songs, Inc.;
Bertelsmann Music Group;
Bertelsmann, Inc.;
Anglo-American Music Holding Corp. Hit & Run Music Publishing Ltd.

Petitioners have no subsidiaries.

Claire's Boutiques, Inc. d/b/a Claire's Boutiques and d/b/a Arcadia is the Respondent in this Court. Respondent's parent corporation is Claire's Stores, Inc. and Respondent has no subsidiaries.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Broadcast Music, Inc., et al., respectfully request that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 949 F.2d 1482 and is reprinted at Appendix ("App.") A to this Petition. The opinion of the Northern District Court of Illinois is published at 754 F. Supp. 1324 and is reprinted at App. B.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 11, 1991. App. C.

This Court has jurisdiction to review by writ of certiorari the judgment of the Seventh Circuit under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

STATUTE INVOLVED

The statute involved is the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq*. The relevant portions of the statute are set forth below.

17 U.S.C. § 101:

To perform or display a work "publicly" means—

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

. . . .

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

17 U.S.C. § 106(4):

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive right to do and to authorize any of the following:

. . . .

> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

17 U.S.C. § 110(5):

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

. . . .

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 501(a):

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 . . . is an infringer of the copyright.

STATEMENT OF THE CASE

Petitioners are songwriters and music publishers who create, publish and, together with their performing rights licensing representative, Broadcast Music, Inc. ("BMI"), license musical works covered by the Copyright Act. The Petitioners' musical works are being systematically exploited by Claire's Boutiques, Inc. ("Claire's"), a national chain of retail stores. Claire's plays BMI songs over loudspeakers in its 669 stores, but refuses to obtain permission to publicly perform and to pay a license fee for such use.

This action is representative of the problem Petitioners potentially face with more than 70,000 chain store operations in the United States. U.S. Dept. of Commerce, *1987 Census of Retail Trade: Establishment and Firm Size* 1-52 (1990). Although the potential license fees from an individual chain store operation is modest (thousands of dollars), the aggregate revenue lost by creators of musical compositions and their publishers could be very substantial (millions of dollars).

Petitioners filed this case in the United States District Court for the Northern District of Illinois against Claire's, alleging eighty-eight counts of copyright infringement. Jurisdiction resided in the District Court pursuant to 28 U.S.C. § 1338(a) because this action arose under the Copyright Act.

This case was presented to the District Court on cross-motions for summary judgment and stipulated facts (App. D and E). Claire's admitted that its activities were infringing if not exempt under Section 110(5). Claire's moved for a finding that its activities were exempt from liability under Section 110(5) and BMI moved for a finding of copyright infringement liability. BMI argued that the Section 110(5) exemption is limited to the operation of a single home-type receiving apparatus by a small business establishment, reflected by the statute, legislative history, and over 10 years of consistent precedent, and does not apply to the use of hundreds of receiving apparatuses by multimillion dollar chain store operations like Claire's.

The District Court granted Claire's motion for summary judgment on December 28, 1990, holding that Claire's is exempt under Section 110(5) from liability for its infringing performances. The District Court denied BMI's cross-motion for summary judgment of infringement liability and dismissed BMI's complaint.

BMI timely appealed the District Court's decision to the Seventh Circuit Court of Appeals. The Seventh Circuit rejected BMI's contentions, finding that (1) despite the legislative history of Section 110(5), the exemption is not limited to small businesses, (2) the phrase "single receiving apparatus" was used by Congress to refer to a single geographic site (thereby permitting a chain store owner to qualify for the exemption), and (3) contrary to precedent, the transmission of a performance from radio receivers in one room to loudspeakers in another, does not constitute "further transmission" of the performance under Section 110(5). On December 11, 1991, the Seventh Circuit affirmed the District Court's decision.

The facts of this case are not in dispute.

1. The Parties.

The Petitioners are (i) the owners of the copyrights in the eighty-eight musical compositions that are the subject of this action and (ii) BMI. (App. 52a, ¶ 8) BMI operates as a non-profit performing rights organization (App. 51a, ¶ 3) expressly recognized under the Copyright Act at 17 U.S.C. § 116(e)(3). BMI has been granted the non-exclusive right to license public performance rights in over one million copyrighted musical compositions, including those involved here. (App. 51a, ¶ 2)

Claire's is a wholly owned subsidiary of Claire's Stores, Inc. (App. 55a, ¶ 1) Claire's owns and operates 719 stores known as "Claire's Boutiques" and 30 stores known as "Arcadia." (App. 55a, ¶ 2) During fiscal year 1990, Claire's had net sales of $168,674,000 and earned $13,402,000 in net income. (App. 56a, ¶ 7)

2. Claire's Use Of BMI Music.

Claire's stores receive radio broadcasts and play them over remote, recessed speakers during all hours they are open. (App. 52a-53a, ¶¶ 9, 13, 14, 15, 17) Claire's stores are open to the public during their normal business hours, and audibly play radio broadcasts over speakers in the sales area during such hours of operation. (App. 52a, ¶ 7) Since there are 23 Claire's Boutiques stores in the Chicago area, it is likely that at least some play the same radio station simultaneously. (App. 57a, ¶ 10)

Claire's has stipulated that on the occasions identified in the complaint, the radio broadcasts it played over the speakers in its stores included the eighty-eight BMI copyrighted musical works at issue. (App. 53a, ¶ 16)

Claire's Arcadia stores division subscribed to a commercial background music service prior to its acquisition by Claire's and for six months thereafter. In addition, 24 Claire's Boutiques stores had a trial subscription to a commercial background music service. (App. 58a, ¶ 19)

3. Claire's Sound Systems.

Claire's owns and operates at least 669 radio receivers and 1,338 speakers as part of the sound systems used at its stores. (App. 58a, ¶ 20)

The receiver at each Claire's store is kept on a shelf in a storage room. (App. 57a, ¶¶ 13, 14) The storage room at Claire's stores is separated from the selling area by a floor-to-ceiling partition wall that runs from one end of the store to the other end (approximately 20 stores have a closet instead of a storage room).[1] These areas are not open to the public. (App. 57a, ¶ 13)

The speakers at Claire's stores are placed only in the public selling area, not in the private rooms where the receivers are located. (App. 57a-58a, ¶¶ 13, 15) One speaker is typically 5-15 feet from the receiver and the other is placed at a 20-35 foot distance. (App. 58a, ¶ 17)

4. BMI's Copyrights.

Claire's recognizes that the copyrights to the musical compositions at issue are valid and enforceable. (App. 52a, ¶ 10) In addition, Claire's recognizes that BMI has been granted the (non-exclusive) right to license the public performance rights in these compositions. (App. 53a, ¶ 11) Claire's has stipulated that its activities alleged in BMI's complaint occurred as alleged, subject only to Claire's assertion that these activities are and were exempt pursuant to 17 U.S.C. § 110(5) (and to certain other defenses not relevant here). (App. 53a, ¶ 16)

REASONS FOR GRANTING THE WRIT

Petitioners respectfully request that this Court grant a writ of certiorari to review the decision of the Seventh Circuit in this case in order to:

Resolve the conflict among the various district courts and between the Second and Ninth Circuits on the one hand, and

[1]Some stores that are still in the remodelling stage keep the receiver behind a "cash-wrap" counter. (App. 58a, ¶ 18)

the Seventh and Eighth Circuits on the other, over the proper construction of the Section 110(5) exemption;[2]

Restore the meaning of the statutory language of Section 110(5) of the Copyright Act to what Congress enacted; and

Re-establish the uniform application of copyright law for songwriters, music publishers and music users.

I. ONLY THIS COURT CAN RESOLVE THE CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

Since its inception, the Section 110(5) exemption has been consistently construed and applied on the basis of the infringer's activities as a whole.

The Seventh Circuit's judgment radically departs from this unbroken line of precedent.[3] Its expansive interpretation goes far beyond every prior decision interpreting Section 110(5), the legislative history and the express language of the exemption. What had been a limited exemption for small "mom and pop" commercial establishments has been expanded by the Seventh Circuit into a free ride allowing multimillion dollar corporations to circumvent the copyright laws.

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[2]In *Edison Brothers' Stores, Inc. v. Broadcast Music, Inc.*, No. 91-2115 (8th Cir. Jan. 13, 1992), the Eighth Circuit followed *Claire's* holding that a national retail operation of more than 2,000 stores was also exempt from copyright licensing under Section 110(5). BMI is concurrently filing a petition for a writ of certiorari in that case.

[3]*Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985) is the only prior case that found a music user to be eligible for the Section 110(5) exemption. Plaintiff in that case, however, chose to treat the receiver operated on the miniature golf course separately from the receiver operated in the larger establishment, *i.e.*, the roller rink. The court indicated that it probably would have denied the exemption had plaintiff sought to hold the business as a whole liable. *Id.* at 1119 n.6.

A. The Seventh Circuit's Decision Conflicts With The Holdings Of Other Circuits And District Courts.

The Seventh Circuit's decision conflicts with every previous decision interpreting Section 110(5) that looked at the defendant's ability to pay license fees. Once the magnitude of the alleged infringer's business activities and use of music was established as substantial, the exemption was deemed inapplicable.

For example, in *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), the first fact which the district court found relevant to its analysis was that The Gap was a chain of approximately 420 stores with revenues of nearly $300,000,000, even though the specific infringements were alleged to have occurred at only two locations. In denying the exemption, the district court declared that "it is clear that Congress did not intend to exempt establishments such as The Gap." 516 F. Supp. at 925. The district court analyzed the defendant's activities as a whole and recognized that such chain store operations were beyond the scope of the Section 110(5) exemption. The Second Circuit likewise examined characteristics common to The Gap as a whole—as a single entity. It did not apply the exemption to each receiver, or each specific location, in isolation. 668 F.2d at 85-86.

Similarly, *Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd* 678 F.2d 816 (9th Cir. 1982), treated the 600 stores of the Casual Corner retail clothing chain as a whole, although the alleged infringements occurred in only three stores. Indeed, the Ninth Circuit affirmed the district court's permanent injunction against "the public performance in *any* Casual Corner store of any musical composition which appears in the BMI repertoire and as to which BMI has the right to license the public performance." 211 U.S.P.Q. at 45, *aff'd*, 678 F.2d at 817 (emphasis added). The Ninth Circuit held that the "size and na-

ture of the operation" precluded the application of the Section 110(5) exemption to the Casual Corner chain. 678 F.2d at 817.

Prior district court decisions have also examined the application of the exemption on a defendant-as-a-whole basis. In *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988), the court focused on common characteristics of the alleged infringer as a whole (a chain of 43 stores with annual revenues of approximately $500,000 per store), such as the chain's gross revenues, its uniform installation of receiving apparatuses and the fact that the chain operation was " 'of a sufficient size to justify, as a practical matter, a subscription to a commercial background music service.' " *Id.* at 1174, 1176. The court held that the entity as a whole did not qualify for the Section 110(5) exemption, not just the two stores where the infringements occurred. *Id.* at 1176.

In *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) 19,555, ¶ 24,790 (N.D. Cal. 1985), the court found that the Section 110(5) exemption did not apply to the defendant chain store operation as a whole, and did not look at the individual stores where the infringements occurred in isolation. *Id.* at 19,556. In addition, the court permanently enjoined the entire chain from publicly performing music without a license. *Id.* at 19,557.

Furthermore, in *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, 1023 (W.D. Pa. 1985), the court examined characteristics of the chain store operation in general. The court considered the chain's corporate policy of playing radio broadcasts as well as its central purchasing of sound equipment as factors in determining the inapplicability of the Section 110(5) exemption.

It is apparent that the Seventh Circuit's decision conflicts with the common conclusion of the prior decisions, *i.e.*, that the application of the Section 110(5) exemption must be ana-

lyzed by considering the size of the entire operation of the alleged infringer. Prior courts have consistently held that the exemption is only available to a small business.

B. The Seventh Circuit's Holding Conflicts With Congressional Intent.

1. Congress Intended That The Section 110(5) Exemption Would Only Apply To Small Businesses.

Congress said that the intent of Section 110(5) was to exempt small businesses.

> It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken* . . . and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H.R. Conf. Rep., No. 1733, 94th Cong., 2d Sess., 75, *reprinted in* U.S.C.C.A.N. 5810, 5816.[4] The legislative history states that the Section 110(5) exemption applies solely to businesses "whose *proprietors* merely bring onto their premises standard radio or television equipment." H.R. Rep., No. 1476, 94th Cong., 2d Sess., 87, U.S.C.C.A.N. 5659, 5701 (emphasis added) (hereinafter referred to as "House Report"). A "proprietor" is "one who has the legal right or exclusive title to property or a business, usually a business owned and controlled exclusively by one person." App. 13a (citing Black's Law Dictionary 1220 (6th ed. 1990)). Congress' use of "proprietor" further emphasizes that it intended the Section 110(5) exemption to apply only to small, single-store establishments.

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[4]In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), this Court held that a small fast-food restaurant where the sole proprietor turned on the radio was not responsible for obtaining permission for the use of music on his premises.

Ironically, the Seventh Circuit did not dispute this. It acknowledged that Congress' intent was to limit Section 110(5) to small businesses. It noted the importance of Congress' use of the word proprietor, and agreed that Congress "only considered companies with one location or storefront" as the potential beneficiaries of the Section 110(5) exemption. App. 13a.

> Congress thought it unfair to impose liability on unsuspecting small business persons . . . [and] that it was impractical to require small organizations to enter into licensing agreements with performing rights organizations.

App. 11a. This is consistent with the Seventh Circuit's prior decision in *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657-58 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375, 378 (7th Cir. 1988), where it affirmed the district court's holding that a defendant must be a "small commercial establishment" for the Section 110(5) exemption to apply. The Seventh Circuit there emphasized that failure of the small business test serves as an independent basis for denying the exemption. 855 F.2d at 378.[5]

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[5]Many other cases have also acknowledged that failure of the "small business" or "commercial background music service" test represents an independent ground for denying the exemption. *See Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037 (D. Mont. 1990) (being a small commercial establishment represents one of the "three basic elements" that a defendant must satisfy to qualify for the Section 110(5) exemption); *U.S. Songs v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991) (it is "well-established law" that a defendant must be a small commercial establishment in order to qualify for the Section 110(5) exemption); *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172, 1175-76 (W.D. Tex. 1988) (failure of the commercial background music service test represents an independent reason for denying the Section 110(5) exemption); *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989) (denying the exemption where defendant was held not to be a small commercial establishment). Further, many other courts have relied upon at least one of these tests to find the Section 110(5) exemption inapplicable. *See,*

(Footnote continued on following page)

But in this case, the Seventh Circuit repudiated this Congressional intent and extended the Section 110(5) exemption beyond small businesses to a multimillion dollar chain store operation. By doing an about-face and striking down the "small business" and "commercial background music service" tests for denying the Section 110(5) exemption, the Seventh Circuit diminished the public performance rights granted by Congress to copyright owners. Commercial establishments in the Seventh Circuit may now believe that they can exploit copyrighted music with impunity. This result could not possibly be the intent of Congress in enacting the Copyright Act.

Congress intended the exemption to be limited to small businesses. The Seventh Circuit's decision contrary to that intent should be reviewed.

2. The Seventh Circuit's Holding Conflicts With Congress' Intent To Expand Coverage Of Copyright Protection.

Congress intended to expand the coverage of copyright protection with its enactment of the 1976 Copyright Act. The term of a maximum of copyright protection was dramatically increased from 56 years to life of the author plus 50 years. Congress eliminated the "for profit" limitation of the 1909 Act, for example, because many non-profit organizations are "highly subsidized and capable of paying royalties." *Almo Music Corp. v. 77 East Adams, Inc.*, 647 F. Supp. 123, 125 (N.D. Ill. 1986). Congress further expanded copyright protection by expanding the definition of performance to include radio transmissions.

(Footnote continued from previous page)
e.g., Merrill v. County Stores, Inc., 669 F. Supp. 1164, 1169 (D.N.H. 1987); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) 19,555, ¶ 25,790 (N.D. Cal. 1985); *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp 923 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

Section 110(5) is a limited exception to the broad protection afforded by the Copyright Act. Given Congress' intent to expand copyright protection, this limited exemption granted in Section 110(5) must be strictly construed.

The Seventh Circuit's analysis completely disregards Congress' intent. It expands the scope of the Section 110(5) exemption, and correspondingly narrows the scope of copyright protection afforded to authors of musical works. Thus, the Seventh Circuit's decision conflicts with virtually every prior decision, and is contrary to express Congressional intent in enacting Section 110(5) and in broadening the coverage of copyright protection. It should be reviewed.

3. The Consequences Of The Seventh Circuit's Broadening Of The Section 110(5) Exemption Are Significant.

The Seventh Circuit's decision changes federal copyright law in Illinois, Indiana, and Wisconsin (as does the follow-on judgment in *Edison Brothers' Stores*[6] for Missouri, Arkansas, Iowa, Minnesota, Nebraska, North Dakota and South Dakota), not only for Petitioners but for all copyright owners and music users. No basis exists for treating music use in these ten Midwest states differently than the rest of the nation. If these decisions stand, copyright owners and users now will have to alter their behavior in one-fifth of the United States.[7] Was the Copyright Act intended to be applied differently in different regions? Absent a grant of the writ of certiorari, such confusion will continue.

C. The Seventh Circuit's Judgment Conflicts With The Statutory Language And Context Of Section 110(5).

The Section 110(5) exemption is expressly limited to the use of "a single receiving apparatus." The Seventh Circuit

[6] *See supra* n.2.

[7] For example, a defendant's activities will be found exempt or not exempt depending upon where a lawsuit may be filed. Therefore, Claire's stores in New Jersey and California may be exempt while The Gap and Casual Corner stores in the same jurisdictions are not.

extended this exemption to the simultaneous use of hundreds of receiving apparatuses by construing the exemption as applying to each receiving apparatus in isolation, rather than to the alleged infringer's overall use of receiving apparatuses to publicly receive copyrighted music.

The Seventh Circuit's logic is faulty. By analyzing each receiving apparatus in isolation, *a fortiori*, the "single receiving apparatus" requirement will almost always be met. Very few, if any, retail establishments would use two receivers to receive the same transmission at the same location. Why even include the "single receiving apparatus" limitation if you are going to analyze each receiver on a one-by-one basis? The notion that Congress included this independent requirement in Section 110(5) "to foreclose the unlicensed playing of more than one receiver at a single geographic site" (App. 15a) makes no sense.

Therefore, the Seventh Circuit's decision is based on an erroneous premise and eradicates an express requirement of Section 110(5). The court's assertion that single means per location at the very least points out the ambiguity in the language of the statute, and thereby requiring an analysis of legislative history. It also lessens the right of songwriters and other copyright owners to be compensated for public performances of their copyrighted music.

1. The Seventh Circuit's "Broadcaster" And "Minimal Benefits" Tests Conflict With The Express Language Of The Copyright Act.

Prior to the Seventh Circuit's decision, to recover for copyright infringement a music copyright owner needed to prove only ownership and unauthorized public performance. To be entitled to an exemption from liability, the infringer always has the burden of proving that its activities come within the scope of the exemption. *Broadcast Music, Inc. v. Hartmarx Corp.*, 1989 WL 121290 (N.D. Ill., Oct. 5, 1989). But now, in the Seventh Circuit, this allocation of the burden of proof has been radically changed. Under the circuit court's decision, the copyright owner now bears the burden of proving

that a music user is not entitled to the Section 110(5) exemption. In ruling on how Section 110(5) should be interpreted, the Seventh Circuit imposed two new burdens on copyright owners. The decision requires that a copyright owner must now establish that a music user is (1) acting like a broadcaster and (2) receiving more than minimal benefits from the infringement. App. 14a-15a & n.10.

The Seventh Circuit's "broadcaster" test requires copyright owners to prove either that the owner initiated the broadcast or told its managers to tune to a particular station. App. 14a. The Seventh Circuit's "minimal benefits" test requires copyright owners to prove that individual store managers receive more than minimal benefits from playing radio broadcasts in order to remove their use from the exemption granted by Section 110(5). App. 15a. It is obvious that Claire's, by playing the radio in its stores, received a benefit. Evidently, Claire's must have believed that playing the radio would substantially benefit its operation or it would not have bothered to purchase radio equipment and have it professionally installed in all of its stores. In any event, to require proof of the extent of the benefit, is extremely difficult, if not impossible. There is no objective way to measure the test created by the Seventh Circuit.

Furthermore, no support exists for these two new tests. They are not based on the statute, and no prior case has ever referred to them. By creating them, the Seventh Circuit has expanded the applicability of the Section 110(5) exemption by imposing on copyright owners the burden of proving that the exemption does not apply. Making the copyright owner prove that the exemption does not apply goes far beyond what Congress had in mind in balancing the rights of copyright owners with small music users.

2. The Section 110(5) Exemption Is Expressly Limited To The Use Of One Receiving Apparatus.

Section 110(5) states that it applies only to the use of a "single receiving apparatus." 17 U.S.C. § 110(5). Congress

did not say a "single receiving apparatus at a single geographic site." Congress' silence on this issue cannot be construed to mean what the Seventh Circuit concluded. As this Court has said: " 'Congress' silence is just that—silence.' " *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)). Congress said how many receiving apparatuses may be used to be entitled to the Section 110(5) exemption—"a single receiving apparatus." Congress meant just what it said. And if there is any doubt as to what Congress meant, the legislative history makes it perfectly clear that substantial users such as Claire's were *not* meant to qualify for the exemption.[8]

Under the Seventh Circuit's reading of the statute, the Section 110(5) exemption could be interpreted to exempt everything but the use of multiple receiving apparatuses operating next to one another, in one store. It is unlikely that anyone would ever do this. Therefore, the Seventh Circuit's "construction" of the statute is based on a faulty premise—*i.e.*, that Congress was trying to prevent what no one would ever do. This is not, and cannot be, proper statutory construction.

3. The Seventh Circuit's Interpretation Of The Section 110(5) Exemption Is Inappropriate.

Before the *Claire's* decision, the "single receiving apparatus" language in Section 110(5) had not been expressly construed. According to the Seventh Circuit, Section 110(5) exempts the use of hundreds of receiving apparatuses by one user. Moreover, instead of the burden being on the alleged infringer to prove that the express conditions of the

[8]This court has examined the legislative history of various provisions of the Copyright Act in other cases where the statute was unclear as to Congress' intent. *See, e.g., Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Section 110(5) exemption are met, the Seventh Circuit's newly created tests shift to the copyright owner the burden of proving that the alleged infringer is acting like a "broadcaster" and receiving more than "minimal benefits" in order for the Section 110(5) exemption not to apply. This is the exact opposite of what the statute requires.

Section 110 provides exemptions from infringement liability only for persons who can prove that they meet the specifically delineated tests. These exceptions to the copyright owner's full enjoyment of his rights exist for public policy reasons. Thus, Section 110 exempts teaching activities, religious services, certain charitable activities, agricultural and horticultural fairs, promotion of the copyrighted work itself, performances by veteran or fraternal organizations and performances for the handicapped. None of these exemptions were intended to benefit large commercial enterprises, since there is no public policy reason for doing so.

Because Section 110 sets forth exemptions from the rights otherwise granted to copyright owners, it must be narrowly construed. *See Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F. Supp. 1190, 1193 (E.D. Va. 1990); Korman, *Performance Rights In Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S. Rev. 521, 534 (1977). As noted by the Tenth Circuit in connection with another exception in the 1909 Copyright Act in *Edward B. Marks Music Corporation v. Colorado Magnetics, Inc.*, 497 F.2d 285, 288 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975):

> [W]e note that we are here concerned with a proviso or exception to the statute vesting a copyright interest in the composer of a musical composition and granting him the exclusive right to determine the use to be made of his copyrighted composition. In this regard, it is the general rule that a proviso should be strictly construed to the end that an exception does not devour the general policy which the law may embody. *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 . . . (1943).

Neither the language nor the structure of Section 110 support construing Section 110(5) as permitting the use of more than "a single receiving apparatus" or as requiring the copyright owner to prove that an infringer is not entitled to the exemption (because it is operating multiple receiving apparatuses in a single location, is acting like a broadcaster, and is receiving more than minimal benefits). The Seventh Circuit's expansion of the Section 110(5) exemption, and corresponding erosion of the public performance rights previously granted to authors, should be reviewed.

II. THE SEVENTH CIRCUIT'S DEFINITION OF FURTHER TRANSMISSION MARKS A RADICAL DEPARTURE FROM AN UNBROKEN LINE OF PRECEDENT.

According to Section 110(5), the exemption does not apply if the performance is "further transmitted" to the public. The receivers in Claire's stores are placed in a room separate and distinct from the selling area of the store where the loudspeakers are located. The Seventh Circuit ignored the prior case law in holding that this does not constitute further transmission.

The Seventh Circuit's decision rejected all precedent and concluded that "further transmission" occurs only when "some device or process . . . expands the normal limits of the receiver's capabilities." App. 24a. This contradicts the express language of the Copyright Act, all precedent, and the legislative history of Section 110(5).

A. The Seventh Circuit's Definition Of Further Transmission Conflicts With The Express Language Of The Statute.

The Copyright Act defines "to transmit" as:

> to communicate [a performance] by any device or process whereby . . . sounds are received beyond the place from which they are sent.

17 U.S.C. § 101. Therefore, "further transmission" means the communication of a performance beyond the place where it is initially received.

The Seventh Circuit rejected this definition, and substituted its own. According to the court, a further transmission must entail the use of "some device or process" that "expands the normal limits of the receiver's capabilities." App. 24a. The Seventh Circuit's definition of "further transmission" in terms of the receiver's capabilities, instead of what is done with the transmission after it is initially received, is unsound for at least two reasons.

First, the words "further transmission" focus on the transmission, not on the receiver. The definition of "further transmission" must therefore focus on what is done with the transmission after a receiver receives it, not on what the receiver does. The Seventh Circuit, however, created a new definition based on its concept that only a broadcaster can infringe.

Second, meeting the Seventh Circuit's definition of "further transmission" would necessarily mean that the receiver would no longer meet the "home-type" requirement. The Seventh Circuit said, but did not establish, that "it is conceivable that even a home-type component could further transmit under this approach. . . ." App. 24a. This cannot be so. The use of a "device or process" that "expands the normal [*i.e.*, home-type] limits of the receiver's capabilities" (App. 24a), expands a receiver beyond the home-type limit by definition. Because Section 110(5) explicitly sets forth the "further transmission" requirement as separate and distinct from the "home-type" requirement, they cannot mean the same thing.

The Seventh Circuit's definition merges these two independent criteria, and expands the applicability of Section 110(5) beyond the scope Congress intended.

B. Precedent Have Consistently Defined "Further Transmission" As Occurring When Speakers Are In A Separate Room From The Receiver.

An unbroken line of precedent holds that "further transmission" occurs when a radio broadcast is received in one room and then transmitted to another room.

For example, the Seventh Circuit affirmed such a holding in *Kowalczyk*:

> In the instant case, the physical layout of the [restaurant] and the positioning of defendant's receiving apparatus is decisive. The performances originated in defendant's private office which is located at one end of the [restaurant] and is completely separate from the public dining areas. Then, by concealed wiring, the defendant sent the broadcasts from his office to the [restaurant]'s coffee shop, dining room, and bar where the patrons heard the music. This is sufficient to constitute 'further transmission'. . . .

665 F. Supp. at 657, *aff'd*, 855 F.2d at 378.

Similarly, the court in *Bill Miller's Bar-B-Q* held that "the radio broadcasts received by defendants were 'further transmitted' to the public because the broadcasts were initially received in a room or area without speakers and were sent to a separate room with speakers via some 40 feet of wiring." 688 F. Supp. at 1176. *See also Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989) ("Finally, since the radio broadcasts received on the defendant's radio/cassette player located in the lobby were sent to the dining rooms over . . . speakers, they were transmissions 'further transmitted to the public' and, as such, outside the scope of the exemption.").

Furthermore, other courts even have found a "further transmission" in any dispersal of a radio broadcast through a commercial establishment. For example, in *Sailor Music*, the Second Circuit affirmed a holding that The Gap further transmitted broadcasts which it received on "radio receivers

and played via *recessed* loudspeakers." 516 F. Supp. at 925, *aff'd per curiam*, 668 F.2d 84 (emphasis added). Likewise, the court in *Hickory Grove Music v. Andrews* held that "[i]n the context of § 110(5), the courts have interpreted 'to further transmit' to mean any dispersal of sound from a point of reception through a restaurant or other establishment." 749 F. Supp. 1031, 1038 (D. Mont. 1990). *See also Hampshire House Publishing Corp. v. Sal and Sam's Restaurant, Inc.*, 1985 WL 9451 (E.D. La. 1985) ("The court further finds, as a matter of law, that the utilization of the remote speakers . . . amounts to the songs received being 'further transmitted to the public.' "); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991) (citing the language quoted above from *Andrews*).

Claire's activities fall squarely within these interpretations of "further transmission." In order to conclude that the store's activities here were not a further transmission, the Seventh Circuit was forced to disregard all precedent.

C. Contrary To The Seventh Circuit's Holding, The Definition Of Further Transmission Found In All Prior Cases Is Relevant.

The Seventh Circuit explains its disregard of all prior cases in a footnote (App. 24a-25a & n.14), arguing: "None of these cases relied *solely* on a finding of further transmission to support its holding." App. 25a n.14 (emphasis added).

However, the fact that two or more independent bases may exist for a decision does not render each basis irrelevant. According to the Seventh Circuit's reasoning, if there are two or more reasons for a decision then none of the reasons stand as precedent. On the contrary, each basis remains independent and stands as precedent for the decision.

Congress provided that failure to meet the "further transmission" requirement is an independent ground for denying the Section 110(5) exemption. The Seventh Circuit's merger of the "further transmission" requirement and the "home-

type" requirement contradicts Congress' intent to control the applicability of Section 110(5). Had Congress not intended the "further transmission" requirement to be a separate condition for application of the exemption, it would not have included it.

D. The Definition Mandated By The Statute And Followed By Precedent Finds Its Roots In Legislative History.

The legislative history confirms that the Section 110(5) exemption does not apply where a broadcast is "further transmitted beyond the place where the receiving apparatus is located." House Report at 87, *reprinted in*, 1976 U.S.C.C.A.N. at 5701. Congress adopted the holding of *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931) under which "further transmission of a broadcast to the public[ ] is considered an infringing act." *Id.* In *Jewell-LaSalle*, this Court found that an infringing performance occurred within the meaning of the 1909 Copyright Act where radio broadcasts were received on a master receiver in one area of the hotel and transmitted to the guests' rooms. Although later Supreme Court cases modified this ruling, Congress expressly noted that this transmission from room to room would be infringing under Section 110(5). House Report at 87, *reprinted in* 1976 U.S.C.C.A.N. at 5701.

Thus, the language and the structure of the statute, all precedent, and the legislative history are consistent—communication of a transmission from one room to another constitutes a "further transmission" and negates the Section 110(5) exemption.

No other court has espoused the interpretation of "further transmission" created by the Seventh Circuit. Only in the Seventh Circuit can commercial establishments now avoid paying license fees for their transmission of copyrighted music from room to room. This anomaly should be corrected.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit to resolve the conflict among the various federal courts, restore the copyright law to reflect Congress' intent, and re-establish the uniformity of copyright law for songwriters, music publishers and users of music throughout the United States.

Respectfully submitted,

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March 10, 1992

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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES,
and d/b/a ARCADIA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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March 10, 1992

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-1232

BROADCAST MUSIC, INC., *et al.*,

Plaintiffs-Appellants,

v.

CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES, and
d/b/a ARCADIA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3881—Ilana D. Rovner, *Judge.*

ARGUED SEPTEMBER 4, 1991—DECIDED DECEMBER 11, 1991

Before CUMMINGS, WOOD, JR., and KANNE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* When must the corporate owner of a chain of retail stores pay copyright license fees for playing radio broadcasts in its stores? Plaintiffs Broadcast Music, Incorporated ("BMI") and various named song publishers[1] sued defendant Claire's Boutiques, Incorporated ("Claire's") for violating copyrights in certain musical compositions. The plaintiff publishers own the copyrights in the compositions at issue but grant to BMI the

[1] As used herein, BMI also includes the 67 song publisher plaintiffs. The American Society of Composers, Authors and Publishers and Muzak Limited Partnership filed *amicus* briefs favoring reversal.

right to license public performances of these compositions. Claire's, which owns and operates a chain of over 700 retail stores, defended BMI's allegations in the district court by claiming shelter in § 110(5) of the Copyright Act. Section 110(5) exempts under certain circumstances persons who play their radio or television in a public place if received by a single receiving apparatus of a kind commonly used in private homes. Both parties moved for summary judgment. The district court granted Claire's motion, and BMI appealed.

I. FACTS

Pursuant to the district court's request, the parties stipulated to the following facts for the purposes of their summary judgment motions.

A. *The Parties*

BMI is a non-profit performing rights organization expressly recognized by the Copyright Act. See 17 U.S.C. § 116(e)(3). Individual publishers grant to BMI a non-exclusive right to license public performance rights in their musical compositions. Besides BMI, the plaintiffs in this case own the copyrights to 88 musical compositions that are the subject of this action.[2]

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[2] The first five songs listed on a schedule to BMI's complaint are:

	Song	*Plaintiff Publisher*
1)	"Shout"	Virgin Songs, Inc.
2)	"Sitting on the Dock of the Bay" a/k/a "Sittin' on the Dock of the Bay"	Irving Music, Inc.
3)	"This Old Heart of Mine (Is Weak For You)" a/k/a "This Old Heart of Mine"	Steve Agate Music, Division of Jobete Music, Inc.
4)	"Way You Make Me Feel" a/k/a "The Way You Make Me Feel" a/k/a "Hot Fever"	Michael Joe Jackson d/b/a Mijac Music
5)	"You Keep Me Hangin' On"	Steve Agate Music, Division of Jobete Music, Inc.

Claire's owns and operates 719 stores under the name Claire's Boutiques and 30 stores under the name Arcadia. These retail establishments are located throughout the United States and are open to the public during normal business hours. Claire's stores range in size from 458 square feet to 2000 square feet. The average size of a Claire's Boutique store is 861 square feet, and 628 of the Boutique stores are less than 1055 square feet. The average size of each Arcadia store is 2022 square feet, and 27 out of the 30 Arcadia stores are greater than 1055 square feet.

During fiscal year 1990, Claire's had net sales of $168,674,000 and earned $13,402,000 in net income. The Claire's Boutiques stores accounted for the majority of these sales ($165,767,233).

B. *Claire's Sound System*

Claire's has a policy to provide the following stereo components to each of its stores: a Radio Shack Optimus STA-20 5-watt stereo receiver, two Realistic Minimus 7 speakers, an indoor antenna, and speaker wire. As a general rule, Claire's ships a radio receiver to each new Claire's store.[3] General contractors install the speakers and associated wiring pursuant to corporate specifications designed to conceal the wiring as much as possible. Stereo receivers are a stock item furnished to each store as a matter of course based on a supply requisition form. When a receiver breaks, the store manager simply orders a replacement receiver from the corporate purchasing manager. In the three and a half year period from 1987 to July 1990, Claire's purchased at least 527 receivers, 1240 speakers, FM antennas, and speaker wire at a total cost of $108,112.42. Claire's currently owns and operates at least 669 receivers and 1338 speakers.

---

[3] Claire's decided to postpone radio playing in its new stores pending the outcome of this litigation. Therefore approximately 65 Claire's stores, which have opened since August 1990, do not have receivers.

The individual Claire's Boutiques and Arcadia stores use the receivers provided by corporate headquarters to receive and play radio broadcasts during regular business hours. Prior to their acquisition by Claire's in October 1989, the Arcadia stores subscribed to a commercial background music service. In addition, 24 Claire's Boutiques stores had a trial subscription to a commercial background music service. Claire's ended both its subscriptions because it concluded that its employees preferred listening to the radio.

The receivers are ordinarily kept in a small storage room at the back of Claire's stores.[4] The door between this room and the selling area is typically closed during business hours. Two strands of speaker wire run from the speaker jacks in the back of the receiver to speakers in the store's selling area. Both strands run through a hole in the wall separating the storage room from the selling area. One strand is attached to a speaker that is hung from the ceiling in the rear corner of the selling area. The other strand of wire runs above the dropped ceiling and is connected to the second speaker which is also hung from the ceiling. The first speaker is an average of 5-15 feet from the receiver, and the second speaker is an average of 20-35 feet from the receiver. Both speakers are hidden by a decorative dropped ceiling.

C. *The Parties' Dispute*

BMI claims that Claire's violates the Copyright Act by playing radio broadcasts in its stores without first obtaining a license from BMI. BMI has offered to provide Claire's with a license at an annual cost of $240 for the first location and $45-$60 for each additional location. One

[4] In some stores, the receiver is kept in a closet rather than a storage room. In other stores, in which remodeling has not been completed, the receiver is kept behind the cash register counter. The parties focus their attention on the most common arrangement of receivers being placed in a separate storage room.

license agreement would cover all of Claire's locations that use receivers to play radio broadcasts. For all the Claire's stores involved in this litigation, the annual BMI licensing fee would be $40,385, an average of $53.92 per store.

Claire's counter-offered to license only its stores that are in excess of 1055 square feet on the condition that BMI not seek to license those Claire's stores with less than 1055 square feet. BMI rejected Claire's counter-offer and commenced this litigation.

D. *The Trial Court Proceedings*

BMI filed its complaint against Claire's on July 10, 1990, alleging 88 counts of copyright infringement. On September 5, 1990, Claire's filed an amended answer that included a counterclaim seeking declaratory judgment that Claire's is exempt from licensing requirements pursuant to 17 U.S.C. § 110(5). Claire's also raised several affirmative defenses, including copyright misuse, laches, and unclean hands.[5] On November 19, 1990, Claire's filed a motion for summary judgment seeking a ruling that it was exempt from liability under § 110(5). On December 3, 1990, BMI filed a cross-motion for summary judgment on the issue of Claire's liability for copyright infringement. The district court agreed with Claire's that it was exempt under § 110(5), granted Claire's motion for summary judgment, and dismissed the complaint on December 28, 1990. *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324 (N.D. Ill. 1990).

II. ANALYSIS

The district court's ruling was based on stipulated facts. The only issue raised on appeal—whether Claire's is exempt under § 110(5) of the Copyright Act—is a question

[5] BMI moved to strike Claire's counterclaim and affirmative defenses. This motion was stayed pending resolution of the summary judgment motions.

of law subject to *de novo* review. Summary judgment will be affirmed only if Claire's is entitled to prevail as a matter of law on the basis of the stipulated facts. See *Campbell v. White*, 916 F.2d 421, 422 (7th Cir. 1990), certiorari denied, 111 S. Ct. 1314. Any necessary inferences from the facts must be drawn in the light most favorable to BMI. *Id.*

The owner of a copyright in a musical work has the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). One obvious example of a public performance is a live musical concert before a substantial paying audience. A live concert, then, is an infringement unless it is licensed or unless an exemption applies. On the other hand, a rendition of a copyrighted song in the shower is not a public performance and therefore not an infringement, so that there is no need to obtain a license or search for an exemption. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155.

The technologies of radio and television, which separate the performer from the audience, make it harder to specify what constitutes a public performance. By analogy, a radio station "performs a work publicly" when it sends out radio signals corresponding to that work because, like a live performer, the radio station decides what work is performed and directs that work to a substantial audience. But, more to the point of this case, does a store manager (or corporate owner) perform a work publicly when she merely receives and plays those radio signals for the benefit of her customers?

Under the Copyright Act of 1976, it is clear that the store manager does engage in a public performance. See *infra* at 9. Some historical background, however, is necessary for a proper understanding of the "single receiving apparatus" exemption contained in § 110(5), which also first appeared in 1976. The Supreme Court addressed "public performance" questions in a series of three cases

decided under the Copyright Act of 1909.[6] In *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, the defendant hotel operator wired a master radio receiving set to each of the public and private rooms in his hotel. Patrons of the hotel could listen to the radio by switching on the loudspeaker in their room. Neither the defendant nor the owner of the radio station whose signal was being received had a license with the plaintiff to perform his song. The question for the Court was whether the hotel operator had performed the musical works in question. *Id.* at 195-196. The Court, noting that the playing of a record is a performance under the Copyright Act of 1909, held that the reproduction of the radio waves into audible sound waves is also a performance. *Id.* at 200-201. Thus Justice Brandeis concluded that the radio station owner and the hotel operator simultaneously performed the works in question. The Court's ruling became known as the "doctrine of multiple performances," with both the hotel and broadcasting station liable for infringement. See M. Nimmer, 2 Nimmer on Copyright, § 8.18 (1991).

The Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, expressly limited the *Jewell-LaSalle* case to its facts. *Id.* at 396 n.18. *Fortnightly* dealt with issues raised by the burgeoning cable television industry. The cable television company in *Fortnightly* received the signals of television broadcasting stations, amplified them, and then transmitted them by coaxial cable to paying subscribers. *Id.* at 392. The Court in *Fortnightly* decided that the cable company's actions did not constitute a performance under the 1909 Copyright Act. The opinion acknowledged that an initial broadcast by a television station is a performance; however, the viewer of the broadcast is merely a "passive beneficiary" of the performance. *Id.* at 398-399. The Court then concluded

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[6] The 1909 Act also gave a copyright owner the exclusive right to perform her work publicly, except that the right only applied to for-profit performances. See M. Nimmer, 2 Nimmer on Copyright § 8.18, at 8-193 n.4 (1991).

that the cable company's actions were more like a passive viewer than an active broadcaster or performer. *Id.* at 399.

Most relevant to the present case, the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, dealt with a restaurant owner who played a radio with four speakers in his restaurant. Defendant Aiken owned a fast-food restaurant where customers usually stayed no more than ten or fifteen minutes. Following *Fortnightly*, the Court considered that the only performance in this situation is initiated by the radio station, and Aiken's largely passive act of turning on a radio was held not to be a performance. *Id.* at 161-162. Since Aiken did not perform, he did not infringe anyone's copyright by playing his radio in his restaurant. The Court reasoned that a contrary ruling would result in practical problems because of the large number of small business establishments in the United States. *Id.* at 162. As an economic matter, the Court felt that a copyright owner was adequately compensated for his work through his license fee with the radio station. *Id.* at 163.

If *Aiken*'s rationale were to apply in our case, the radio playing by Claire's store managers would not be performances and BMI would have no case. Congress, however, rejected *Aiken*'s rationale, if not its result, in the Copyright Act of 1976. The drafters defined "perform" and "perform publicly" broadly in 17 U.S.C. § 101:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process * * *.
>
> * * *
>
> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Under these particular definitions, the restaurant owner in *Aiken* "performed" the works in question by "playing" them on a "device"—the radio receiver. Furthermore, the performances were "public" because they took place at a restaurant "open to the public." For the same reasons, Claire's, through the actions of its employees, engages in public performances of copyrighted works when it plays the radio during normal business hours.

Even though Congress rejected the Supreme Court's conclusion that the defendant in *Aiken* had not performed, the legislative history reveals that Congress did not intend to make him liable for copyright infringement. See *H.R. Rep.* No. 94-1476, 94th Cong., 2d Sess. 86, 87 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5701 [hereafter House Report] ("Under the particular fact situation in the *Aiken* case * * * it is intended that the performances would be exempt under clause (5)"). Section 110(5) of the new act enabled Congress to achieve this result:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> * * *
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 110(5). Because it helps explain the exemption and because BMI and Claire's argue over its meaning and relevance, a significant portion of the legislative history is quoted below:

> [The exemption's] purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.
>
> The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. * * *
>
> The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101. * * * [F]urther transmission of a broadcast to the public is considered an infringing act.
>
> Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at this point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment * * * . Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas

> within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

House Report at 86-87, reprinted in 1976 U.S.C.C.A.N. 5659, 5700-5701. The Conference Report adds:

> the intent of the conferees [is] that a small commercial establishment of the type involved in *Aiken*, which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976), reprinted in 1976 U.S.C.C.A.N. 5810, 5816 [hereafter Conference Report].

The legislative history reveals several reasons why Congress passed the § 110(5) exemption. Congress thought it unfair to impose liability on unsuspecting small business persons. Congress believed also that it was impractical to require small organizations to enter into licensing agreements with performing rights organizations. The secondary use of radio broadcasts in small establishments, Congress also recognized, would have only a minimal effect on authors' incentives to create new works.

On the face of the statute, the exemption is available only if (1) a single receiving apparatus is used, (2) the single receiving apparatus is of a kind commonly used in private homes, (3) the transmission is provided free of charge, and (4) the transmission is not "further transmitted" to the public. The parties agree that Claire's does not charge for the privilege of listening to the radio broadcasts in its stores. The parties contest, however, the applicability of the other three elements required by § 110(5). They also disagree on the proper meaning and relevance of the legislative history.

BMI argues first that the district court erred in considering Claire's operations on a store-by-store basis. BMI contends that Claire's actions must be considered as a whole. When viewed in this light, according to BMI, Claire's must be found liable for copyright infringement because it operates at least 669 receivers, not a "single receiving apparatus" as required by § 110(5). BMI also claims that Claire's cannot be exempt from copyright infringement because, when viewed as a whole, it fails the so-called "small business" and "background music service" tests. Finally, BMI claims that, even if Claire's operations are viewed on a store-by-store basis, Claire's cannot claim the § 110(5) exemption because its receiving apparatus is not of a type commonly used in private homes and also because the transmission received is further transmitted into a separate room. We address these contentions in turn.

A. *The "Single Receiving Apparatus" Issue*

Section 110(5) does not discuss how to treat chain stores such as Claire's. BMI contends that Claire's cannot claim that it uses a "single receiving apparatus" for the simple reason that, on a corporate-wide basis, it uses 669 receivers. Claire's counters that its activities must be viewed on a store-by-store basis and that it is stipulated that only one receiver is used in each store.

The district court concluded that the legislative history showed that Congress did not intend to exclude chain stores from claiming the § 110(5) exemption. This conclusion was based on the fact that Congress intended to reaffirm that the exemption would apply to the situation in *Aiken*. As the district court opinion in *Aiken* noted, the defendant's restaurant was part of a chain. *Twentieth Century Music Corp. v. Aiken*, 356 F. Supp. 271, 272 (W.D. Pa. 1973). Therefore, the district court below reasoned, "Congress cannot have intended [that courts examine chains as a whole] if it also intended to reaffirm the result in *Aiken*." 754 F. Supp. at 1336.

We agree with BMI that the district court's analysis of this issue cannot be accepted. The Supreme Court's opinion in *Aiken* focused exclusively on one store and one receiver. It is the Supreme Court's decision in *Aiken*, not the district court's decision, that Congress naturally focused on when considering the issues raised by the § 110(5) exemption. Moreover, the legislative history uses the word "proprietor,"[7] implying that Congress only considered companies with one location or storefront.

Congress did not address, in either the statute or any legislative history, the precise issue of whether all the receivers of a commonly owned organization are to be counted for the purposes of § 110(5), or only those receivers in a particular location. Section 110 provides exemptions to "infringements of copyright," with no reference to whether corporate actions that infringe a copyright are to be considered as a whole. Some subsections refer specifically to individuals,[8] whereas other subsections refer specifically to groups.[9] Subsection (5), on the other hand, does not contain a description of what types of individuals or groups are entitled to freedom from copyright liability. This omission presumably implies that anyone could benefit from the exemption. Indeed, under 17 U.S.C. § 501,

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[7] The House Report states that "the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment * * * but it would impose liability where the proprietor has a commercial 'sound system' installed." House Report at 87, 1976 U.S.C.C.A.N. at 5701. A proprietor is one who has the legal right or exclusive title to property or a business, usually a business owned and controlled exclusively by one person. Black's Law Dictionary 1220 (6th ed. 1990).

[8] For example, §110(1) exempts the "performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution."

[9] Section 110(6) exempts in certain circumstances the "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization * * *."

"Anyone who violates any of the exclusive rights of the copyright owner * * * is an infringer of the copyright." "Anyone" of course includes both corporate entities and individual persons.

In one sense, it seems more appropriate to consider Claire's as the infringer as opposed to its individual store managers. Claire's instituted and has carried out a policy of playing radio music without a license in its public stores. Its store managers, although they may have the discretion to choose which station to play, are merely following corporate policy when they switch on the receivers in their stores. The legal fiction of corporate personhood was developed precisely for this type of case.

That Claire's is the potential infringer does not mean, however, that all its receivers must be counted together for the purposes of § 110(5). The language of the statute speaks of one performance of one work, describes the type of receiving apparatus that may be used, and disallows an admission charge or further transmission. The statute asks: under what circumstances was the radio used to perform this one work? Was one receiving apparatus used, was a charge made, was the work further transmitted? The statute does not ask how many receiving apparatuses were used to receive a number of different works. The language of the statute thus strongly suggests that the proper analysis should be limited to the area where a single work is performed.

This case would be different if Claire's itself initiated the broadcast of an identical work to each of its 669 stores. Then Claire's would be more like a radio station owner or broadcaster. It would also be a different case if Claire's told its managers to tune to a particular station—Claire's would in that case also have some indicia of a broadcaster. In this case, however, the individual store managers sim-

ply tune the receivers to the station of their choice.[10] By using the phrase "single receiving apparatus," Congress simply wanted to foreclose the unlicensed playing of more than one receiver at a single geographic site.

An examination of the history and policy behind the § 110(5) exemption bolsters our conclusion that the exemption in this case was properly limited to each individual store. The problem addressed by this exemption is where to draw the line between uses of copyrighted works that should be considered infringements and uses that should not be considered infringements. Although Congress broadly defined "public performances" in the Copyright Act of 1976, it was aware that some performances were more public than others. Those performances that are less public are those where the "secondary use * * * is so remote and minimal that no further liability should be imposed." House Report at 86, 1976 U.S.C.C.A.N. at 5700. Congress decided that the way to judge the benefit to the otherwise infringing person (assuming that no charge was made) was to focus on the type of receiver used—was there a "commercial sound system?" Since a sound system exists in only one geographical area, our analysis is likewise limited. When viewed one store at a time, it is clear that Claire's only used a single receiving apparatus. This result is consistent with Congress' intent because, like the defendant in *Aiken*, each individual store manager receives only minimal benefit from her receiver.

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[10] BMI notes that it was stipulated that "[s]ince there are 23 Claire's Boutique stores in the Chicagoland area, it is likely that at least some play the same radio station simultaneously" (Br. A-38). Assuming that it is true that some of the stores received the same transmission, this does not mean that Claire's loses because it uses more than one receiving apparatus to receive that work. Our conclusion is that unless Claire's acted like a broadcaster, the analysis must be limited to the single business site where the receiving apparatus operates.

B. *The "Small Business" and "Background Music Service" Tests*

BMI also relies on the legislative history and several reported cases for the proposition that § 110(5) cannot apply to a large profitable business such as Claire's. The legislative history refers to the exemption being for "a small commercial establishment * * * not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service * * * ." Conference Report at 75, 1976 U.S.C.C.A.N. at 5816. BMI asserts that the case law interpreting this language sets forth two separate requirements: that Claire's be a "small business" and that Claire's not be of a size and nature that would as a practical matter justify a subscription to a background music service. It is obvious that these two so-called tests collapse into one issue: how does the financial size of the alleged infringer relate to the § 110(5) exemption?

The legislative history certainly repeats the phrase "small commercial establishment" in several places. What is unclear is whether the word "small" refers to the physical size of an individual storefront or the financial size of the company that owns the storefront. Language in the history regarding the size being insufficient to "justify, as a practical matter, a subscription to a background music service" suggests that financial size is the important consideration. Other parts of the legislative history suggest the opposite: "a small commercial establishment * * * which merely augmented a home-type receiver," *id.* (suggesting one physical establishment and one receiver); "the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on," House Report at 87, 1976 U.S.C.C.A.N. at 5701 (same).

Ultimately we need not resolve this issue. As the district court stated, "Congress chose to effectuate [the intent to exempt small commercial establishments] by drawing a distinction based on the type of sound equipment utilized and the nature of the transmission." 754 F. Supp.

at 1333. Any rule developed under § 110(5) based on the financial strength of the company seeking the exemption would be directly contrary to the terms of the statute. The statute speaks only of 1) the number of receiving apparatuses used, 2) whether the sound system is of a type commonly used in private homes, 3) whether music is further transmitted, and 4) whether admission was charged. Legislative history cannot be used to invent rules totally unrelated to the language of the statute. It is appropriate instead for the purpose of clarifying an ambiguous statute or, what is often the same thing, applying the statute to a situation not clearly foreseen by the drafters of the statute. *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

It is true that a holding that the financial strength of Claire's is irrelevant contradicts the language of several other cases. These cases, however, typically rely independently on an analysis of the stereo system that the infringer had installed in its store.

This Court mentioned but did not discuss the propriety of a "small business" test in *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375 (1988). The defendant in *Kowalczyk* had been found liable for playing the radio in his restaurant, and on appeal he did not contest that determination but only questioned whether he could be liable for willful infringement and attorney's fees. The small business test was mentioned only in the context of describing the lower court's opinion. The district court in *Kowalczyk* did state that "given both its physical size and substantial revenues, [defendant] is a large enough establishment to accommodate a background music service." *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 658 (N.D. Ill. 1987). However, the district court also independently found that the defendant did not use a receiving apparatus of a kind commonly used in private homes, and also further transmitted the music to the public. *Id.* at 657-658. Either of these holdings would have sufficed to deny to defendant the application of the exemption.

Indeed, no case has relied solely on the financial size or ability of the defendant as a reason for denying the application of § 110(5). The two reported Circuit cases that consider the exemption both rely on alternative grounds for finding that § 110(5) did not apply. In *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982), the court held that the defendant failed to qualify for the exemption "because each store has a commercial monaural system, with widely separated speakers of a type not commonly used in a private home, *and* the size and nature of the operation justifies the use of a commercial background music system." *Id.* at 817 (emphasis supplied). Similarly, the Second Circuit based its affirmance of a finding that § 110(5) did not apply to a particular defendant on both the physical size of the defendant's establishment and the financial strength of the defendant. *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981), certiorari denied, 456 U.S. 945. District court cases relied upon by BMI also do not rest their decision solely on the defendant's revenues and ability to subscribe to a commercial background music service.[11] Rejection of a

[11] See *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763 (W.D. Tex. 1990) (Exemption does not apply because the sound system had eleven speakers and was of a commercial type, but also noting that the restaurant grossed between $800,000 and $900,000 in revenues); *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539 (D. Me. 1989) (Exemption does not apply for the independent reasons that a sound system with 8 to 10 speakers is not a kind commonly used in private homes, that the defendant further transmitted the music, and the defendant is not a small commercial establishment); *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988) (Exemption does not apply for the independent reasons that a system using Muzak stereo speaker grilles and 40 feet of speaker wire was not of a type commonly used in private homes, the music was further transmitted, and defendants were of a sufficient size to justify a subscription to a commercial background music system); *Merrill v. County Stores, Inc.*, 669 F. Supp. 1164 (D.N.H. 1987) (Exemption does not apply because a system with 14 to 15 speakers covering 13,000 square feet of public selling area and that is also integrated with

(Footnote continued on following page)

rule based on the financial strength of the defendant does not require a different result in any of these cases.

In sum, BMI is not entitled to reversal just because Claire's is a large and profitable business. The district court properly held that these considerations, notwithstanding the conclusions of other courts, are not relevant under § 110(5).

C. *Commonly Used in Private Homes*

BMI also contends that, even when considered on a store-by-store basis, Claire's does not use a "receiving apparatus of a kind commonly used in private homes" (a "home-type system"). The district court, after a thorough analysis of a number of different factors, concluded that Claire's used a home-type system in its stores.

The phrase "receiving apparatus" is somewhat unclear and could refer either to the receiver itself or to the entire stereo system, including the receiver, speakers, antenna, and wiring. We conclude that the entire system should be examined for the following reasons. Congress could have, as it does in the legislative history, simply used the word "receiver" if it had wanted to limit the analysis. In addition, "apparatus" is defined as "the totality of means by which a designated function is performed * * * [or] a group of machines used together * * * to accomplish a task." American Heritage Dictionary 120 (2d ed. 1982). A stereo system fits neatly into this definition of appa-

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[11] *continued*

the store's telephone network is not a kind commonly used in private homes and also because defendant's $2.5 million revenue stream means it is not a small commercial establishment); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Rep. (CCH) 19,555, ¶25,790 (N.D. Cal. 1985) (Exemption does not apply because system with 6 to 10 speakers covering 10,000 to 14,500 square feet of area is not of a kind commonly used in private homes, because the music was further transmitted, and because defendant was of sufficient size to warrant use of a commercial background music system).

ratus; it uses all its components to perform the task of converting radio waves into audible sound waves.

Because we examine the entire stereo system, there are two ways a company can fall out of the § 110(5) exemption for failure to use a home-type system. If the company uses any non-home-type components in its stereo system, then the system is not home-type. Analysis does not end, however, if all the components are home-type. The company also may not claim the exemption if it configures and uses home-type components in a manner not commonly found in a home. See *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1037 (D. Mont. 1990).

The components in this case are home-type. The receiver is small, measuring approximately 10 inches by 7 inches by 3 inches and delivering only 5 watts of power. Its list price is $129.95, and it is capable of driving only two speakers. Although affidavits from an expert (i.e., someone experienced in the business of selling stereo systems to both homes and businesses) would be helpful in cases such as these, the district court properly concluded that this type of receiver is commonly used in private homes. The speakers used by Claire's are similarly small (7″ by 5″ by 4″) and of limited power. Their list price is $49.95 each, and they are designed either to stand on a table or be mounted on a wall or ceiling. The speaker wire used is 18-gauge and is the type recommended for use in the speaker's manual. The antenna is similarly limited, retailing for only $2.97. When examined individually, all these components are home-type.

The next issue to consider is whether Claire's has configured home-type components in a way not commonly found at home. The district court examined the following factors relating to the system's configuration: number of speakers used, manner in which the speakers are installed, use of concealed wiring, distance of speakers from the receiver, and integration of the stereo system with other technologies. In this case, these factors do not all point in the same direction: the dropped speakers and con-

cealed wiring point toward denying the exemption, whereas the limited number of speakers used (2), the relative closeness of the speakers to the receivers (5-35 feet), and the lack of integration of the system to other technologies point toward allowing the exemption. It is therefore appropriate to evaluate the relative weight to give each factor.

Legislative history is a proper guide in interpreting the somewhat ambiguous notion of a home-type system. In this case, the history reveals that Congress considered the stereo configuration in *Aiken* to represent the "outer limit" of the exemption. That stereo system consisted of a radio with outlets to four "loudspeakers" in the ceiling. The restaurant in *Aiken* was of the "fast-food" variety and only accommodated about 40 patrons. Although not mentioned in the legislative history or in the *Aiken* case at any level, the parties apparently agree that the restaurant in *Aiken* was 1055 square feet in size, with a serving area of 620 square feet.

Although the legislative history nowhere suggests a hard and fast rule, it is apparent that Congress intended the exemption to apply only to stereo systems that produce music over a limited area. First, the outer limit of *Aiken* is described as a radio set with four speakers "in a narrow circumference" around it. The history also states several times that the exemption is for "small commercial establishments." As mentioned above, considerations of financial size are irrelevant to our analysis. The physical size of an establishment, however, is relevant as indicative of the reach of a stereo system. Systems commonly used in homes only cover a limited area (usually only one room).[12] The legislative history explicitly makes size a relevant factor: "factors to consider in particular

[12] The size of an establishment is relevant only as evidence of the scope of the stereo system. A store can show that a particular stereo system only covers a specific, limited portion of its total square footage.

cases [include] the size * * * of the areas within the establishment where the transmissions are made audible."[13]

Claire's stores are small. 631 out of 749 of Claire's stores are less than 1055 square feet. The smallest store is 458 square feet; the largest store is 3300 square feet. The parties stipulate that one speaker averages five to fifteen feet from the receiver, and the other speaker averages twenty to thirty-five feet from the receiver. The fact that the broadcast of music in this case covers these small areas strongly indicates that the stereo system is of a kind commonly used in private homes. We do note that Claire's larger stores (greater than 2000 square feet) are closer to exceeding the size of a typical home and thus present closer cases. Even the larger stores, however, are not of a sufficiently large size to deny automatically application of the exemption.

The legislative history also lists as a relevant factor "the extent to which the receiving apparatus is altered or augmented for the purpose of improving * * * the performance * * *." Claire's has not altered or augmented the stereo system in any fashion in this case. The system has not been integrated with a public address or telephone system. Only two speakers are used, the maximum that the receiver can handle without alteration. This factor indicates that the configuration is home-type.

Two factors weigh in BMI's favor: the hiding of the speakers in a dropped ceiling and the concealment of the speaker wires. We agree with the district court that these factors should be accorded only minimal weight. The important considerations in determining whether a system

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[13] Although we agree that the *financial* size of an establishment is irrelevant, we disagree with the district court's conclusion that the *physical* size of the establishment is not a relevant concern under § 110(5). See 754 F. Supp. at 1332-1334. As the discussion above indicates, this consideration does not bring into play a contradictory rule but rather gives content to what Congress meant by the term "receiving apparatus of a kind commonly used in private homes."

is home-type are the type and sophistication of the equipment used, the size of the area in which the broadcast is audible, and whether the equipment has been altered, augmented, or integrated in some fashion. One might argue that since most homeowners do not drop speakers from the ceiling or conceal speaker wire in the ceiling, a system with these characteristics is not home-type. But Congress intended to preserve the exemption for the system in *Aiken* that had loudspeakers in the ceiling and presumably included hidden wiring. In addition, the legislative history focuses on the quality and scope of the broadcast as determining factors—the hiding of the wire and of the speakers is only marginally relevant to analysis of these factors.

BMI also argues that Claire's use of a corporate policy to coordinate the installation and replacement of the sound systems in its stores means that the systems cannot be considered home-type. This argument is without merit. The manner in which a system is installed is irrelevant to the determination of whether it is a home-type system. Claire's uses a home-type system in its stores. The system consists of simple components, it broadcasts over a small area, and it is not augmented or improved in any fashion.

D. *Further Transmission*

BMI's final argument is that Claire's further transmits the music broadcasts it receives in its stores and therefore fails to qualify for the § 110(5) exemption. The phrase "further transmitted" is not defined in the Copyright Act. To "transmit" is "to communicate [a performance] by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101. A radio station transmits its broadcasts, which are received by numerous radio sets. The question in this case is whether Claire's further transmits the broadcast it receives.

BMI argues that "it is undisputed that Claire's causes sounds to be received beyond the place where the per-

formance is initially received" (Br. 39). This argument assumes that the performance is initially received at the receiver and then "further transmitted" via wire to other areas. Whatever its technical merits, this view of "further transmission" is contrary to the legislative history. The system in *Aiken* consisted of a radio set connected, presumably by wires, to four speakers. Congress intended such a system to be exempt under § 110(5). Yet BMI's proposed rule would deny the exemption to the store in *Aiken*. In addition, the statute uses the term "receiving apparatus," which, as discussed above, encompasses not just the receiver but all the components of an integrated music system. It is sensible to consider that the entire receiving apparatus, and not just the receiver, "receives" the performance.

BMI refines its argument by suggesting that the fact that the receiver is placed in a back room separate from the selling area means that the music is further transmitted. This argument also fails. The nature of the transmission does not change because the speaker wire passes over or through a wall. If Congress wanted the rule to be that the receiver must be in the same room as the speaker for the exemption to apply, it could have easily said so.

To further transmit a performance must mean more than to run speaker wire through a wall. It must entail the use of some device or process that expands the normal limits of the receiver's capabilities. We recognize that this construction of "further transmission" means that most systems that further transmit also are not home-type. But since it is conceivable that even a home-type component could further transmit under this approach, the requirement of no "further transmission" is not mere surplusage.[14]

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[14] We recognize that other cases find "further transmission" to occur solely because the speakers were placed in a different room

(Footnote continued on following page)

III. CONCLUSION

A recurring theme in BMI's argument is that Congress never intended § 110(5) to apply to multimillion dollar corporations such as Claire's. This may be so, but the job of this Court is to apply the laws passed by Congress, and not to enforce a generalized and vague notion of intent. In any event, Congress' intent to limit the exemption to financially small organizations is far from clear. The language of § 110(5), as well as most of its legislative history, is concerned with the quantity and quality of the receiving equipment used—is there more than one, is it home-type, does it further transmit? Congress, it seems, was not so much concerned with whether an establishment could afford a license but rather with whether the nature of the sound system was such that the performance it renders is more justly considered public in the common-sense, if not technical copyright, notion of that term. The sound system used by Claire's passes the statutory tests for exemption, and therefore the judgment below for Claire's is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[14] *continued*

than the receiver. See *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657 (N.D. Ill. 1987), affirmed, 855 F.2d 375 (7th Cir. 1988); *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Me. 1989); *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Rep. (CCH) 19,555, 19,556 ¶ 25,790 (N.D. Cal. 1985); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021, 1022 n.1 (W.D. Pa. 1984); *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), affirmed, 668 F.2d 84 (2d Cir. 1981), certiorari denied, 456 U.S. 945. None of these cases relied solely on a finding of further transmission to support its holding.

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APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROADCAST MUSIC, INC., et al., *Plaintiffs,* v. CLAIRE'S BOUTIQUES, INC. d/b/a CLAIRE'S BOUTIQUES and ARCADIA, *Defendant.*	No. 90 C 3881 Hon. Ilana D. Rovner

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This case raises an issue concerning the scope of the "single receiving apparatus" exemption from the Copyright Act's grant to copyright owners of the exclusive right to publicly perform their works. It is brought by Broadcast Music, Inc. ("BMI"), which holds copyrights to musical compositions, against Claire's Boutiques, Inc. ("Claire's"), which owns and operates 749 retail stores. Pending are cross-motions for summary judgment. For the reasons described below, BMI's motion is denied and Claire's motion is granted.

II. FACTS

The essential facts relevant to the pending motions are undisputed.[1] Claire's owns and operates 719 individual retail stores under the name Claire's Boutiques and 30 stores un-

[1]Although the parties initially represented that the facts were not in dispute, their submissions in connection with the summary judgment motions raised a number of factual disputes. Pursuant to the Court's request, the parties then resolved their differences with respect to the essential facts and submitted a joint stipulation of material facts. The Court has relied primarily on that joint stipulation for its discussion of the facts.

der the name Arcadia. The Claire's Boutiques stores sell women's accessories, and the Arcadia stores sell stationery, games, and novelty items.[2]

The Claire's Boutiques stores range in size from 458 square feet to 2000 square feet, with an average size of 861 square feet. Ninety-one of the stores are greater than 1055 square feet, and 628 are less than 1055 square feet. The Arcadia stores range in size from 748 square feet to 3300 square feet, with an average size of 2022 square feet. Twenty-seven of the stores are greater than 1055 square feet, and three are less than 1055 square feet.

During fiscal year 1990, Claire's has net sales of $168,674,000 and earned $13,402,000 in net income. The Claire's Boutiques stores averaged $264,681 in net sales and $20,986 in net profits. The Arcadia stores, which Claire's acquired in October, 1989, averaged $126,381 in net sales and $15,870 in profits during the last quarter of fiscal year 1990, which included the Christmas season.

With the exception of approximately 65 stores,[3] Claire's stores receive radio broadcasts which are normally played in the stores during all hours they are open.[4] The equipment in each store includes a 5-watt stereo receiver, an indoor antenna, two speakers, and speaker wire. The same equipment is also used in Claire's warehouse, which is approximately 10,000 square feet in size.

The receiver used by Claire's is a Radio Shack Optimus STA-20 AM/FM receiver. It does not have built-in speakers, and it has jacks that allow the connection of only two speakers. The speakers are Realistic Minimus 7 speakers, also sold

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[2]See Def. Ex. 19; Del Re Dep. at 206.

[3]Those 65 stores opened after August 1990, and Claire's has decided not to play radio broadcasts in those stores pending the result of this litigation.

[4]Because there are a number of stores in the Chicago area, it is likely that at least some play the same radio station simultaneously.

by Radio Shack. They measure six inches by six inches by eight inches. They are designed to be set on a flat surface or hung from a wall or ceiling. Claire's utilizes 18-gauge speaker wire to connect the speakers to the receiver.[5] Claire's pays $103.96 for each receiver, $39.95 for each speaker, and $2.24 for each indoor antenna. These prices reflect volume discounts of 20 to 25 percent. The record does not indicate the amount Claire's spends on the speaker wire.

Altogether, Claire's owns and operates at least 669 receivers and 1,338 speakers. It orders 20 to 50 receivers per order and up to 300 speakers at a time. It maintains the equipment as a stock item, and a new receiver is shipped when a new store is built or when a receiver breaks and a new one is ordered from Claire's by the individual store. During the last four years, Claire's has spent a total of a little over $100,000 on stereo equipment.

The selling area in most stores is separated from a storage area by a partition wall. In those stores, the receiver is kept on a shelf in the storage area. In some stores, there is a closet rather than a storage area, and the receiver is kept on a shelf in the closet. In yet other stores, in which remodelling has not been completed, the receiver is kept behind the cash register counter. The parties have not contended that there is any material difference between the three arrangements, and have focused their attention on the first and most common arrangement.

The stores have decorative dropped ceilings with a grid composed of lights running just below the dropped ceiling. The speakers are attached to the upper ceiling, and they hang down to a point approximately six inches above the light grid. They are installed by general contractors when the stores are built.

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[5]The instructions for the speakers provide: "Use speaker wire or ordinary 18-gauge SP-T lamp cord ('zip cord') for distances between amplifier and speaker of 50 feet (15 m) or less. Over 50 feet (15 m), use heavier 16-gauge wire." (Def. Ex. A.)

A speaker wire runs from each of the receiver's two speaker jacks up the partition wall and through a hole in the partition wall. One wire is connected to a speaker which hangs from the ceiling in the rear corner of the selling area. This speaker is located at an average distance of five to fifteen feet from the receiver. The other wire runs above the dropped ceiling and is connected to a speaker which hangs from the ceiling at an average distance of twenty to thirty-five feet from the receiver. The speaker wire is concealed as much as possible.

BMI is a performing rights society recognized by the Copyright Act, 17 U.S.C. §116(e)(3). It licenses public performance of copyrighted musical compositions, including about 50 percent of all compositions performed over the radio in this country.[6] For an annual fee, BMI offers a license to music users to perform the compositions in its repertoire.

Prior to their acquisition by Claire's, the Arcadia stores subscribed to a commercial background music service. Claire's discontinued the subscription approximately six months after the acquisition. Twenty-four Claire's Boutiques stores also had a trial subscription to a commercial background music service. Claire's ended the trial subscription because its employees preferred listening to the radio.

It is BMI's position that Claire's violates the Copyright Act by playing radio broadcasts in its stores because Claire's is not licensed by BMI. BMI has offered to provide Claire's with a license which would encompass all public performances of BMI music by Claire's at an annual cost of $240 for the first location and $45 to $65 for each additional location. The total cost of the license for all the stores involved in the pending motions would be $40,385, which amounts to

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[6]Anastas Aff. ¶4. Although Claire's disputes the relevance of this representation and does not concede its accuracy, it is undisputed that BMI licenses at least some of the music that has been played over the radio in Claire's stores.

an average of $53.92 per store. Claire's has offered to purchase a license encompassing all stores which have a size in excess of 1055 square feet, on the condition that BMI not seek to license the remaining stores. BMI has rejected this offer.

In this action, BMI and various artists who it represents have brought suit for copyright infringement based on specific songs which were broadcast into Claire's stores over the receiver and speakers owned by Claire's. The only dispute raised by the pending motions is whether Claire's is statutorily exempt from the licensing requirements of the Copyright Act pursuant to 28 U.S.C. §110(5).[7]

III. ANALYSIS

A. Background

The Copyright Act gives a copyright holder certain exclusive rights in her copyrighted works. These include the exclusive rights of public performance of musical works. *See* 17 U.S.C. §106.[8] Unlicensed performances which do not conflict with the exclusive rights granted by the Act do not infringe on the holder's rights. As the Supreme Court pointed out, "[n]o license is required by the Copyright Act,

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[7]Claire's has raised additional affirmative defenses and has filed a counterclaim, which BMI has moved to strike. The parties agreed that briefing of all other motions should be stayed pending the resolution of the pending motions for summary judgment. BMI's motion for summary judgment relates only to liability for copyright infringement, and it does not address affirmative defenses or the counterclaim. Claire's motion for summary judgment raises only the §110(5) exemption.

[8]17 U.S.C. §106 provides, in part:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; . . . .

for example, to sing a copyrighted lyric in the shower." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 155, 95 S.Ct. 2040, 2043 (1975).

In *Aiken*, the Court was faced with the issue of whether the use of a radio in a fast-food establishment infringed on the exclusive rights of the owners of the copyrighted songs broadcast on the radio. The restaurant utilized a receiver with outlets to four speakers mounted in the ceiling. The Court noted that "the broadcast of a copyrighted musical composition by a commercial radio station [is] a public performance of that composition for profit—and thus an infringement of the copyright if not licensed." 422 U.S. at 158, 95 S.Ct. at 2045. However, the Court's precedents indicated that one who listens to the broadcast through the use of a radio receiver does not perform the composition. *Id.* at 161, 95 S.Ct. at 2046, citing *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 88 S.Ct. 2084 (1968), and *Teleprompter Corp. v. CBS*, 415 U.S. 394, 94 S.Ct. 1129 (1974). The Court then stated:

> To hold in this case that the respondent Aiken "performed" the petitioners' copyrighted works would thus require us to overrule two very recent decisions of this Court. But such a holding would more than offend the principles of *stare decisis;* it would result in a regime of copyright law that would be both wholly unenforceable and highly inequitable.

Id. at 162, 95 S.Ct. at 2046-47. The Court stated that such a holding would be unenforceable because of the large number of business establishments with radio or television sets, and inequitable because it would authorize "the sale of an untold number of licenses for what is basically a single public rendition of a copyrighted work." *Id.* at 162-63, 95 S.Ct. at 2047.

In 1976, Congress created an explicit exemption modelled after the Supreme Court's holding in *Aiken*. This exemption provides:

> [C]ommunication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes [does not constitute a copyright infringement], unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public.

17 U.S.C. §110(5).[9] This provision is discussed in the Report of the House Committee on the Judiciary:

> [I]ts purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.
>
> The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. . . .
>
> It is the intent of the conferees that a small commercial establishment of the type involved in [*Aiken*], which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply. . . .
>
> Under the particular fact situation in the Aiken case, assuming a small commercial establishment and the use

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[9]Although this provision supported the *Aiken* result, it changed the rationale; in contrast to the Supreme Court's conclusion that no "performance" had occurred, under the new statute a performance does occur but does not require a license. *See* 2 Nimmer on Copyright §8.18[B] (1990).

> of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 87 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5701 and 17 U.S.C.A. pp. 145, 148-149 (1977).

At issue in this case is whether Claire's falls within the §110(5) exemption. The burden of proof lies on Claire's to show that it falls within the exemption. *See BMI v. Hartmarx*, No. 88 C 2856, 1989 WL 121290 (N.D. Ill. Oct. 5, 1989). BMI does not contend that Claire's makes a direct charge to see or hear the radio broadcasts, *see* 17 U.S.C. §110(5)(A). Accordingly, the statute provides three elements which Claire's must prove to establish that the exemption applies: (1) it uses a single receiving apparatus; (2) the receiving apparatus is of a kind commonly used in private homes; and (3) Claire's does not further transmit to the public the transmissions it receives. A central issue in this case,

apparently one of first impression, is whether this analysis should focus on each individual store or on the corporation as a whole. If the individual stores would not be exempt, it is unnecessary to consider this larger issue. Accordingly, the Court shall first examine the application of the statute to the individual stores.

B. Individual Stores

1. *Single Receiving Apparatus*

There is no dispute that each store, considered individually, operates only one radio receiver. Accordingly, the first element of the exemption is satisfied.

2. *Kind Commonly Used in Private Homes*

A number of courts have examined various models and configurations of receivers and speakers in order to determine whether the sound systems are of a kind commonly used in private homes. Although by its terms the statute requires only that the "receiving apparatus" be of a kind used in private homes, courts have examined the entire sound systems, including the speakers and speaker wiring, in making this determination. *See, e.g., Hickory Grove Music v. Andrews*, 1989 WL 161985 (D. Mont. 1990) (to be published at 749 F.Supp. 1031) ("courts must examine the entire system and the context of its use, rather than focusing on individual components"). The factors which courts generally examine include (1) whether the receiver and other equipment itself is generally sold for commercial or private use; (2) the number of speakers which the receiver can accommodate; (3) the number of speakers actually used; (4) the manner in which the speakers are installed; (5) whether the speaker wires are concealed; (6) the distance of the speakers from the receiver; and (7) whether the receiver is integrated with a public announcement system or telephone lines.[10] Al-

[10]*See National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986) (system not home-type where it used satellite dish to receive signals); *Hickory Grove*, 1989 WL 161985.

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749 F.Supp. at 1038 (system not home-type where receiver was connected by concealed wiring to five recessed ceiling speakers at a distance of up to 45 feet and where speakers were originally installed to support public address system); *Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F.Supp. 1190, 1193 (E.D. Va. 1990) (system not home-type where it included four recessed ceiling speakers and four public address horns mounted on light poles); *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 767 (W.D. Tex. 1990) (system not home-type where it included a commercial type tuner wired into a public address system, commercial quality microphones, and eleven commercial speakers installed throughout restaurant); *Gnossos Music v. DiPompo*, 1989 Copyright L. Dec. (CCH) ¶26,483, 13 U.S.P.Q.2d (BNA) 1539 (D. Me. 1989) (system not home-type where it consisted of portable radio/cassette player in restaurant lobby, connected by concealed wiring to eight to ten recessed commercial-quality speakers in dining rooms and lobby); *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F.Supp. 1172, 1175 (W.D. Tex. 1988) (system not home-type, even though individual components were home-type, where receiver was connected by 40 feet of hidden wiring to eight unfinished, ceiling mounted speakers spaced 30 feet apart); *Merrill v. County Stores, Inc.*, 669 F.Supp. 1164, 1170 (D.N.H. 1987) (system was not home-type where it could be interrupted for paging purposes, it was integrated into telephone network, and it included 14 or 15 recessed ceiling speakers covering 13,000 square feet of floor area); *International Korwin Corp. v. Kowalczyk*, 665 F.Supp. 652, 655, 657 (N.D. Ill. 1987) (system not home-type where receiver had paging capabilities, three sets of speaker terminals, and capacity for driving 40 speakers, and was attached to eight remote ceiling speakers with concealed wiring), *aff'd*, 855 F.2d 375 (7th Cir. 1988); *Rodgers v. Eighty Four Lumber Co.*, 617 F.Supp. 1021, 1023 (W.D. Pa. 1985) (system not home-type where separate receiver and amplifier were used, where system contained public address system, where there were 2 to 5 speakers inside the store and 1 to 3 speakers outside the store, and where most speakers were located 150 feet from the receiver); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F.Supp. 1113, 1118 (M.D.N.C. 1985) (system not commercial, even though receiver was wired to six speakers mounted on light poles over 7500 square foot area of miniature golf course, because of inferior noise level and audibility); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶25,790 (N.D. Cal. 1985) (system not home-type where it included "receiving equipment and [six to ten] ceiling-mounted speakers akin to a commercial background music system" and speakers were "not arranged within a narrow circumference from the receivers").

though courts have not generally clarified the relative weight or the relationship of these various factors, this Court finds such a discussion to be necessary.

BMI argues that the systems in this case contain certain features which are similar to those in cases where the systems have been found not to be of a type commonly used in private homes, and BMI emphasizes Claire's use of ceiling speakers and concealed wiring. Claire's responds that its equipment is less sophisticated than that in the vast majority of the cases relied on by BMI. Both of the parties' arguments are correct, but neither is determinative. In order to resolve this issue, the Court shall look in turn at each of the factors enumerated above.

1. *The equipment itself.* The Court finds that the components themselves are of a type commonly used in private homes. The receiver delivers only 5 watts of power, far less than many receivers sold for private use. It sells for a price lower than many receivers sold for private use. Even a cursory review of newspaper advertisements reveals many more sophisticated receivers designed for home use. Similarly, the speakers are small and are clearly designed for private home use, and the speaker wire is the type recommended by the speakers' manual.

2. *Number of speakers receiver can accommodate.* The receiver in this case contains jacks for only two speakers.[11] Home-type receivers typically accommodate two or four speakers. In this respect, the receivers used by Claire's stores are home-type receivers.

3. *Number of speakers used.* Two speakers are in fact used in each store, and this factor weighs in favor of finding that it is a home-type system. Indeed, the legislative history

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[11]BMI's assertion that the receiver can drive any number of speakers—an assertion that does not resurface in the joint stipulated facts—is contradicted by the receiver itself and the owner's manual, both of which have been submitted as exhibits.

indicates that a system which includes four speakers may qualify for this exemption.[12]

4. *Manner in which speakers are installed.* The speakers in this case are concealed in a dropped ceiling. Many courts have treated ceiling-mounted speakers as indicative that a system is home-type. This court agrees that the use of ceiling-mounted speakers weighs against application of the exemption, but it cautions that this factor is not determinative. Where all other factors point to a home-style system, the fact that one hangs the speakers from a ceiling rather than setting them on the floor or shelf or mounting them on a wall should not change the result. First, it is not difficult to mount speakers in a ceiling, and private consumers increasingly utilize sophisticated home entertainment arrangements, including speakers recessed in a wall or ceiling. Second, where all other factors point in favor of a finding that the system is home-type, making the result change if the business installs the speakers in a ceiling can hardly fulfill the intent of Congress. If, as BMI states, Congress intended to protect small commercial establishments, making the copyright exemption turn on the use of ceiling-mounted speakers would be an odd choice for a yardstick.[13]

5. *Use of concealed wiring.* This factor is closely related to the use of ceiling-mounted speakers, and the analysis is similar. In virtually all of the precedents, the use of concealed wiring has been noted where the speakers were mounted in the ceiling. The Court again finds that this factor is somewhat relevant but not determinative. As Claire's points out, it is rather naive to suggest that speaker wires in private homes are generally short and exposed. Concealing the speaker wires—as well as recessing the speakers in a ceiling—serves more of an aesthetic purpose and has little relevance to the sophistication of the sound system.

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[12]*See* H.R. Rep. No. 94-1476, *supra* at 32a-33a.

[13]Thus in *Aiken*, the result of which Congress intended to preserve, the store utilized four ceiling-mounted speakers.

6. *Distance of speakers.* In cases involving ceiling-mounted speakers attached by concealed wiring, courts have often noted the distance of the speakers from the receiver.[14] The Court finds that this factor should be considered but is relatively insignificant. Congress did intend to exempt small business establishments,[15] and it could be argued that if the distance between the receivers and the speakers is large, the business is not likely to be the type of small establishment Congress had in mind. However, this factor is addressed by the other factors relevant to the home-type analysis; home-type components are unlikely to suffice to provide sound for a large commercial establishment. Furthermore, the area covered by a home-type sound system is not likely to be significantly affected simply by placing the speakers at a large distance from the receiver—speakers do not become louder simply by being placed further from the receiver. Finally, the Court takes judicial notice that many speakers are sold to private consumers for the express purpose of listening to the radio in a room other than that in which the receiver is located.

In this case, the speakers are located up to 15 and 35 feet from the receiver. The Court finds this to be within the range of equipment commonly used in private homes.

7. *Integration with other systems.* The receivers used by Claire's are not integrated with public address systems or telephone lines. They play only unaltered radio broadcasts. Accordingly, this factor weighs in favor of Claire's.

To summarize, all of the factors weigh in favor of Claire's with the exception of the use of concealed wiring and ceiling-mounted speakers. As noted above, the Court does not view these two factors as sufficient in themselves to change the result. Much more significant are the nature of the components themselves and any fundamental modifications to the

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[14]The House report noted that in *Aiken*, the speakers were located within a relatively small circumference. *See supra* at 33a.

[15]*See supra* at 32a-33a.

equipment which alter the very nature of the performance. The Court finds that the Claire's stores, examined on an individual basis, use a sound system of a type commonly used in private homes.

3. *Further Transmission*

The Court next examines whether the transmissions received by each Claire's store are further transmitted to the public.[16] There are two related theories pursuant to which Claire's may be considered to engage in a further transmission of the radio broadcasts it receives: first, that further transmission occurs whenever the broadcast is relayed from a receiver to external speakers through speaker wire; and second, that further transmission occurs when the speakers are not located in the same room as the receiver.

Although there is some support for each of these theories in the case law,[17] the Court cannot accept either of them. First, to read "further transmission" as including the mere

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[16]The Copyright Act defines "transmit" as follows: "to 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. §101. Although the Act does not define "further transmission," it does define "secondary transmission" as "the further transmitting of a primary transmission simultaneously with the primary transmission . . . ." 17 U.S.C. §111(f).

[17]*See Hickory Grove*, 1989 WL 161985, 749 F.Supp. at 1038 (further transmission occurred where radio broadcasts were sent to other rooms, public could hear them, and music was recognizable); *Gnossos*, 1989 Copyright L. Dec. ¶26,483 (further transmission occurred where radio broadcasts were sent to separate rooms); *Bill Miller's*, 688 F.Supp. at 1176 ("the radio broadcasts . . . were 'further transmitted' to the public because the broadcasts were initially received in a room or area without speakers and were sent to a separate room with speakers via some 40 feet of wiring"); *Kowalczyk*, 665 F.Supp. at 657 (use of speakers in separate rooms constituted further transmission); *Lammination*s, 1985 Copyright L. Dec. ¶25,790 ("By the very nature of the radio-over-loudspeaker installations, the performances of plaintiffs' songs were 'further transmitted' from the receivers to the loudspeakers.").

transmission over the speaker wires themselves is to read this element right out of the statute. Every radio requires wiring—whether external or internal—to reach the speakers which make the sound. To describe this as a further transmission means that every sound system utilizes a further transmission.[18] If Congress had intended this result, it would not have created the §110(5) exemption in the first place. Furthermore, the store in *Aiken*, which Congress intended to be encompassed by the exemption, involved the use of speaker wires to reach concealed ceiling speakers.

Second, it would be arbitrary and pointless to make resolution of this element dependent on the length of the speaker wire involved. The length of the wire does not alter the nature of the transmission. A system which utilizes excessive lengths of speaker wire is likely to include other features which make it not the type of system commonly used in private homes; the "further transmission" element should not be distorted to substitute for the home-type equipment element.

Third, the mere fact that the speaker wire is run through or around a wall does not alter the type of transmission. Again, the use of speaker wire either is or is not a further transmission; the analysis of this element should not depend on the manner in which the wire is routed, just as it should not depend on the wire's length. Perhaps if the receiver feeds a number of speakers, each of which is in a different room, the exemption should not apply—although again, that configuration seems more appropriately addressed in terms of the home-type element. Under BMI's logic, however, a system which is otherwise exempt would become non-exempt merely if the receiver were placed in a closet and the other aspects of the system remained the same. Congress cannot have intended the application of the exemption to turn on such an insignificant distinction. Furthermore, as noted above, speakers are often sold for private use in rooms

[18]This would also imply that the original transmissions can never be heard, because they would consist merely of the radio waves before they are made audible.

separate from receivers. Surely Congress did not intend that such a private system would come within its idea of "further transmission."

In view of the nature and purpose of the exemption, "further transmission" can only mean something more substantial, such as a re-broadcast of a transmission or the use of cable to service multiple receivers. It cannot encompass the mere use of the speaker wire which enables a home-type receiver to drive its speakers.

4. *Size of Establishment*

The three factors discussed above exhaust the elements listed in the statute. However, a number of courts have proceeded—without considering the appropriateness of this endeavor—to draw additional elements from the legislative history. They have thus examined the size of the business itself, looking to such factors as the physical size of the area covered by the performance, the number of customers served, and the revenues.[19] These factors stem from the

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[19]*See Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981) (store with area of 2769 square feet was of sufficient size to justify subscription to commercial music service and therefore not exempt), *cert. denied*, 456 U.S. 945, 102 S.Ct. 2012 (1982); *Hickory Grove*, 1989 WL 161985, 749 F.Supp. at 1038-39 (only small commercial establishments qualify; relevant are square footage, capacity, and revenues; 880 square feet open to public is too large); *Gnossos*, 1989 Copyright L. Dec. ¶ 26,483 (not small commercial establishment where 1,824 square feet was open to public and dining rooms accommodated 172 people); *Crabshaw*, 744 F.Supp. at 767 (in finding store not exempt, court noted size was 7000 square feet and gross annual revenues were $800,000 and $900,000); *Bill Miller's*, 688 F.Supp. at 1176 (chain of restaurants not exempt where each restaurant covered 1000 to 1500 square feet and grossed over $500,000 annually and where restaurants had previously subscribed to music service); *County Stores*, 669 F.Supp. at 1170 (store not exempt where annual sales were $2.5 million and size was 13,000 square feet); *Rodgers*, 617 F.Supp. at 1023 (stores with public areas in excess of 10,000 square feet not exempt); *Springsteen*, 602 F.Supp. at 1119 (miniature golf course which covered 7500 square feet was not of sufficient size to justify subscription to music service where it was open only six months

(footnote continued on next page)

House Report's statements that the exemption is intended to apply to "small commercial establishments" which may not be large enough to "justify . . . a subscription to a commercial background music service," that the *Aiken* facts represent the "outer limit," and that the "size, physical arrangement, and noise level" of the establishment are relevant.[20] Both parties agree in this case that the Court should look beyond the face of the statute to the factors noted in the House Report, but they disagree as to precisely which factors apply and how they are relevant. BMI focuses on the revenues and profits of the stores, and Claire's focuses on their physical size.

The Court must first address whether factors other than those specified in the statute should be considered at all. Although precedents concerning principles of statutory interpretation often send confusing signals, the Seventh Circuit in *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989), has provided a thorough and sensible guide to the question of when a court may look to factors beyond the text of a statute in interpreting that statute. The court in that case resolved the superficial inconsistency between two common maxims of statutory interpretation: that courts should not look to legislative history to interpret an unambiguous statute, and that statutes should be interpreted in order to best effectuate their intent. As the court in *Sinclair* explained, the latter principle allows courts to examine even apparently

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(*Footnote continued from previous page*)
per year and rarely generated revenues over $1000 per month); *Lamminations*, 1985 Copyright L. Dec. ¶ 25,790 (businesses were of sufficient size to warrant use of commercial background music system where they covered 10,000 to 14,500 square feet and where two of them already used such services). *See also Kowalczyk*, 665 F.Supp. at 655, 658 (business was not small commercial establishment where it covered 2,640 square feet and had annual net profits of $35,000 to $136,000). (*Kowalczyk* was affirmed by the Seventh Circuit, which summarized the district court's opinion but did not rule on the appropriate elements to be considered. *International Korwin Corp. v. Kowalczyk*, 855 F.2d 375, 378 (7th Cir. 1988).)

[20] *See supra* at 32a-33a.

unambiguous statutes in light of their legislative history in order to decode the terms used in the statute—to determine whether the words used had a different meaning to an insider than they do to the general public, or that the words have gaps which leave elaboration to the executive and judicial branches. 870 F.2d at 1342. However, although the legislative history may thus help a court discover the statute's meaning, it may not be used to change it. *Id.* at 1344.

> Legislative history may show the meaning of the texts—may show, indeed, that a text 'plain' at first reading has a strikingly different meaning—but may not be used to show an 'intent' at variance with the meaning of the text. . . . Legislative history helps us learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S. Code.

Id.

In this case, to examine statistics concerning square footage or revenues and elevate them to an importance equal or even greater than the factors enumerated in the text of §110(5) itself is to violate this principle, drawing on legislative history to formulate "rules competing with those found in the U.S. Code." The text of the §110(5) includes nothing at all about the size of a business, the area that it covers, or the revenue that it generates. Certainly the legislative history may be useful in terms of interpreting such factors as "further transmission" and "single receiving apparatus of a kind commonly used in private homes." It may not, however, be used to supply additional elements beyond those specified in the statute.

It certainly is apparent from the legislative history that Congress' intent in enacting §110(5) was to exempt small commercial establishments. It is equally clear from the text of §110(5) that Congress chose to effectuate this intent by drawing a distinction based on the type of sound equipment utilized and the nature of the transmission. It did not choose

to protect small businesses by drawing distinctions based on square footage or revenues. Furthermore, it is hardly irrational for Congress to determine that its intent could indeed be realized by the manner it adopted; Congress could reasonably believe that only small commercial establishments would be able to make effective use of a single home-type receiving apparatus, and that the elements it specified would preclude larger establishments from benefitting from the exemption.[21]

Claire's has suggested that the square footage of individual stores is of paramount importance. It notes that the store in *Aiken*, which Congress described as the "outer limit," had a total of 1055 square feet and selling space of 620 square feet, and urges that any store smaller than that should be exempt. Claire's has also offered to license those stores larger than the one in *Aiken* if BMI would not seek to license the remaining stores.[22] As noted above, a number of courts have found the physical size of an establishment relevant, and some have even relied on it exclusively. To do so, however, is to bring into the analysis an element of arbitrariness which Congress did not include in the statute and which the Court cannot believe Congress ever intended to adopt. Surely Congress would not have wanted the exemption determined by a matter of a few square feet, and it chose more relevant criteria concerning the nature of the

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[21]Even if the statute did not in practice fulfill Congress' intent, that would not provide a basis for enforcing the intent rather than the text. As Judge Easterbrook wrote in *Sinclair*:

> If Congress were to reduce the rate of taxation on capital gains, "intending" that this stimulate economic growth and so yield more in tax revenue, the meaning of the law would be only that rates go down, not that revenue go up—a judge could not later rearrange rates to achieve the "intent" with respect to federal coffers.

870 F.2d at 1344.

[22]The Court finds no indication that, as BMI suggests, Claire's has actually conceded that those stores larger than that in *Aiken* do not qualify for the exemption.

sound system. It is rather pedestrian to suggest that in describing *Aiken* as the outer limit, Congress could only have thought in terms of square feet. In fact, the Supreme Court in *Aiken* never even stated the physical size of the restaurant, and the size is not specified in the House Report, much less in the statute itself. The Court finds that the square feet covered by an establishment is, at best, a very minor factor in determining the applicability of the exemption.[23]

The Court finds an examination of a store's revenues and profits to be of minimal importance for the same reasons. Neither the Supreme Court nor Congress specified the amount of revenues or profits achieved by the restaurant in *Aiken*. Congress could easily have drawn a distinction based on financial criteria, and it chose to write no such distinction into the statute. Rather, it chose another manner to control the size of the establishments entitled to the exemption, and that was to rely on the type of equipment and transmission utilized.

It is equally unhelpful to discuss as a separate factor whether a business is capable of subscribing to a commercial background music service. Congress has already chosen a method for making this determination, and that method is specified in §110(5). If courts were to look beyond the text, and place determinative emphasis on whether a given establishment could afford a commercial service, then the exemption would effectively disappear. Licensing organizations and background music providers could simply choose to ex-

[23]Consider two distinct hypothetical establishments which utilize the basic equipment involved in this case. One, an ice cream parlor smaller in size than the restaurant in *Aiken*, has the stereo equipment prominently displayed and played at a high volume, easily audible throughout the entire seating area. The other is a cafe, much larger than the restaurant in *Aiken*, which has the stereo equipment set on a small table in a back corner, facing toward the seating area. Other factors being the same, surely Congress cannot have intended these establishments to be treated differently, and if Congress did so intend, surely it would have included physical size an as express factor in the text of the statute.

tend to every small business a low enough rate to remove them from the exemption.[24]

As the statute stands, it provides no basis for concluding that the exemption is to be applied according to the size and profitability of a business. If BMI or other licensors desire another result, their remedy lies with Congress itself, which has the power to rest the exemption on such factors but has not done so.

5. Summary

The Court finds that the stores in this case, considered individually, qualify for the exemption in §110(5). Each store uses a single receiver; each store uses equipment of a type commonly found in private homes, and no store engages in further transmission of the broadcasts it receives. The fact that some of the stores may be slightly larger than 1055 square feet or take in more revenue or profits than did the restaurant in *Aiken* does not remove them from the scope of the exemption.

C. Chain as a Whole

Having determined that the stores considered individually qualify for the exemption, the Court turns to the issue of whether the chain of stores should be examined in its entirety. If the chain must be examined as a whole, it apparently is not exempt. It operates more than a single receiver—it operates at least 669—and would thus fail to satisfy the first criterion. Furthermore, a sound system of 669 speakers and 1338 speakers is not the type of system commonly found in private homes, so the chain would not satisfy the second criterion.

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[24]If a business's revenues or ability to afford a commercial background service were of predominant importance, a large conglomerate corporation which merely placed a portable radio in a small snack shop would presumably not be exempt. Again, in light of the language of §110(5), it is apparent that Congress did not intend such a result.

In support of its argument that the analysis should focus on the chain as a whole, BMI states that only one license is necessary to cover all of the stores. BMI would base the license fee, however, on the number of stores which play radio broadcasts. Furthermore, the manner in which BMI elects to structure its license agreements should not affect the scope of the exemption; the single license is not inherent in the nature of the performance but rather is determined by BMI. The exemption depends not on the type of license agreement involved, but rather on the equipment used by the allegedly infringing store.

BMI also argues that the Copyright Act defines "publicly" performing a work as being unaffected by whether "the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. This definition makes it clear that the mere fact that the Claire's stores perform radio broadcasts in a number of different places does not preclude the performance from being public.[25] It does not, however, provide guidance in determining whether the entire chain is the appropriate focus for a §110(5) inquiry.

Although this precise issue has apparently not been litigated before, there are a number of cases in which courts have examined the applicability of §110(5) to stores which were members of chains. In each of those instances, the court has centered its analysis primarily, if not exclusively, on the individual store or stores rather than on the chain as a whole. *See Sailor Music*, 668 F.2d at 85-86 (focusing on size of individual store); *Bill Miller's*, 688 F.Supp. at 1174–76 (examining type of components used by each store and size and revenues of each store, and noting also the revenues of the entire chain); *Rodgers*, 617 F.Supp. at 1023 (focusing on

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[25]*See, e.g., Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 51 S.Ct. 410 (1931) (hotel transmission of radio broadcasts to speakers in individual guests' rooms was a performance within the scope of the Copyright Act).

size of, and type of components used by, each store); *Lamminations*, 1985 Copyright L. Dec. ¶25,790 (focusing on size of each store and type of components used by each store).

An examination of the text of §110(5) provides little guidance—it defines the exemption in terms of the nature of the performance rather than the nature of the business. Although the statute does specify the elements which are relevant in determining whether a performance is exempt, it does not specify what entity should be examined—an individual store or its corporate owner. Thus, unlike the issue of the relevant elements of the exemption, it is appropriate to examine the legislative history for guidance as to whether the chain as a whole should be considered. Most helpful is the statement in the House Report that Congress intended to reaffirm that the exemption would apply to *Aiken*. In *Aiken*, the store involved was part of a chain. *Twentieth Century Music Corp. v. Aiken*, 357 F.Supp. 271, 272 (W.D. Pa. 1973). If the *Aiken* case were to arise under current law, and if the court were to analyze the chain as a whole, the chain would not be exempt because it does not use a single receiving apparatus of a kind commonly used in private homes. Indeed, if chains are to be examined as a whole, no chain in which more than one store utilized a radio receiver would be exempt. Congress cannot have intended this result if it also intended to reaffirm the result in *Aiken*. The Court can only conclude, therefore, that Congress intended the exemption to be analyzed in terms of individual stores.[26] Again, BMI's

[26]BMI might argue that because the Court has determined that legislative history is relevant on this issue, the Court should rely on the House Report's reference to the size of the business and hold that the chain as a whole must be examined. The Court cannot accept this argument. In order to give effect to Congress' intent to affirm the result in *Aiken*, the only way in which courts could apply §110(5) to chain stores would be to draw arbitrary lines based, for instance, on the number of stores in the chain. Such an exercise is not appropriate for the judiciary, and there is no indication that Congress intended to create such an exercise for the

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arguments to the contrary are best directed toward Congress itself.

IV. CONCLUSION

The Claire's stores must be considered on an individual basis rather than in the aggregate. Because each store operates only a single receiving apparatus of a type commonly used in private homes, and does not further transmit the radio broadcasts it receives, the stores are exempt from liability for copyright infringement pursuant to 17 U.S.C. §110(5).

ENTER:

ILANA DIAMOND ROVNER
United States District Judge

DATED: December 28, 1990

(Footnote continued from previous page)
courts. If Congress had intended such lines to be drawn, it could easily have drawn them. Furthermore, there is no inherent difference in the nature of the performance if 10 individually-owned stores, which all play an otherwise exempt radio broadcast, subsequently are combined in a chain. Of course, if the receivers operated collectively—for instance if Claire's received a radio broadcast at a central location and then re-transmitted it to the various individual stores—then the exemption would presumably not apply. However, in order to deny the exemption in that case, there would be no need to rule that the focus should shift to the chain as a whole; the text of §110(5) would itself apply to deny the exemption, for there would be a "further transmission."

APPENDIX C

United States Court of Appeals
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: December 11, 1991

BEFORE: **Honorable** Walter J. Cummings, Circuit Judge

Honorable Harlington Wood, Jr., Circuit Judge

Honorable Michael S. Kanne, Circuit Judge

No. 91-1232

BROADCAST MUSIC, INCORPORATED,
VIRGIN SONGS, INCORPORATED,
IRVING MUSIC, INCORPORATED, et al.,
Plaintiff—Appellant

v.

CLAIRE'S BOUTIQUES, doing business as
CLAIRE'S BOUTIQUES and ARCADIA,
Defendant—Appellee

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 90 C 3881, Judge Ilana D. Rovner

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROADCAST MUSIC, INC., et al. *Plaintiffs,* v. CLAIRE'S BOUTIQUES, INC., d/b/a CLAIRE'S BOUTIQUES, and d/b/a ARCADIA, *Defendant.*	CIVIL ACTION No. 90 C 3881 Judge Rovner Magistrate Rosemond

STIPULATION

IT IS HEREBY AGREED AND STIPULATED by the parties to this action, Broadcast Music, Inc., et al. ("plaintiffs") and Claire's Boutiques, Inc. ("Claire's"), that without prejudice to and preserving Claire's Affirmative Defenses and Second Counterclaim (and its right to pursue discovery and motions regarding them) and Claire's pending Motion for Summary Judgment, the following are true and correct statements of fact that may be received in evidence and relied upon by the Court without further proof in support thereof.

1. Broadcast Music, Inc. ("BMI") is a corporation organized and existing under the laws of New York, with its principal place of business located at 320 West 57th Street, New York, New York 10019.

2. BMI has been granted the right to license the public performance rights in approximately one and one-half million copyrighted musical compositions, including those that are alleged to have been infringed by Claire's identified in paragraphs 6 and 7 of the Complaint.

3. BMI operates as a non-profit corporation.

4. Claire's is a corporation organized and existing under the laws of Delaware, with its principal place of business located at 1501 N. Michael Drive, Wood Dale, Illinois 60191.

5. Claire's owns, operates and controls at least 733 retail establishments known as "Claire's Boutiques" and "Arcadia," located throughout Illinois and the United States.

6. Claire's owns, operates and controls the Claire's Boutiques and Arcadia stores identified in paragraphs 6 and 7 of the Complaint, and did so at all relevant times as alleged in the Complaint.

7. All Claire's Boutiques and Arcadia stores, including those identified in paragraphs 6 and 7 of the Complaint, were at all relevant times as alleged in the Complaint, and are, open to the public during their normal business hours, and all (except approximately 65 stores opened since August, 1990) play radio over speakers audibly in the sales area during such hours of operation.

8. Each of the eighty-eight (88) musical compositions identified on Line 2 of the Schedule was created by the person(s) named on Line 3 of the Schedule. Each of these musical compositions contains matter copyrightable under the Copyright Act.

9. On or about the dates indicated on Line 5 of the Schedule, the publishers named on Line 4 of the Schedule (including any predecessors in interest) complied in all respects with the requirements of the Copyright Act and received from the Register of Copyrights Certificates of Registration bearing the numbers listed on Line 6 of the Schedule.

10. The copyrights in and to each of the eighty-eight (88) musical compositions identified on Line 2 of the Schedule are valid and enforceable, and were valid and enforceable on the dates listed on Line 7 of the Schedule.

11. On the dates listed on Line 7 of the Schedule, BMI had been assigned the public performance rights in each of the eighty-eight (88) musical compositions identified on Line 2 of the Schedule. BMI licenses the public performance rights in the musical compositions identified on Line 2 of the Schedule.

12. On the dates listed on Line 7 of the Schedule, the plaintiffs listed on Line 4 of the Schedule were the owners of the copyrights in and to the respective musical compositions identified on Line 2 of the Schedule. The plaintiffs listed on Line 4 of the Schedule still own the copyrights in and to the respective musical compositions identified on Line 2 of the Schedule.

13. On the dates listed on Line 7 of the Schedule, neither Claire's nor any of the stores Claire's owns, operates or controls, were licensed or otherwise authorized by plaintiff BMI, or any other plaintiff to publicly perform any musical composition.

14. Prior to the dates listed on Line 7 of the Schedule, Claire's had been informed by BMI that Claire's performances of music in Claire's stores, by receiving radio broadcasts over speakers, constituted copyright infringement under 17 U.S.C. §101, *et seq.*

15. Prior to filing the Complaint, BMI offered a license to Claire's for public performances in all Claire's stores of any of the musical compositions to which BMI has been assigned the public performance rights.

16. For purposes of the summary judgment motions filed by Claire's and BMI, it is stipulated that Claire's activities as alleged in the Complaint occurred as alleged, subject only to Claire's assertion that its activities are and were exempt pursuant to 17 U.S.C. §110(5), and its other affirmative defenses and second counterclaim.

SO STIPULATED:

BROADCAST MUSIC, INC., et al.	CLAIRE'S BOUTIQUES, INC.
By: _____	_____
Robert G. Krupka, P.C. Nicole J. Klimisch KIRKLAND & ELLIS 200 East Randolph Dr. Chicago, IL 60601 (312) 861-2000	Andrew H. Bart PRYOR, CASHMAN, SHERMAN & FLYNN 410 Park Avenue New York, NY 10022 (212) 326-0162
Dated: 12/3/90	Dated: 11/29/90

APPENDIX E

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROADCAST MUSIC, INC., et al., *Plaintiffs,* - against - CLAIRE'S BOUTIQUES, INC., d/b/a CLAIRE'S BOUTIQUES, and d/b/a ARCADIA, *Defendant.*	90 C 3881 Judge Rovner Magistrate Rosemond

SUPPLEMENTAL JOINT STIPULATION OF MATERIAL FACTS

IT IS HEREBY STIPULATED AND AGREED by the parties to this action, Broadcast Music, Inc., et al. ("BMI") and Claire's Boutiques, Inc. ("Claire's") that the following are true and correct statements of fact that may be received in evidence and relied upon by the Court without further proof in support thereof.

1. Claire's is a wholly owned subsidiary of Claire's Stores, Inc.

2. Claire's owns and operates 719 stores under the name Claire's Boutiques and 30 stores under the name Arcadia.

3. Claire's Boutiques stores range in size from 458 square feet to 2000 square feet. The average size of each Claire's Boutique store is 861 square feet. 91 of these stores are greater than 1055 square feet and 628 stores are less than 1055 square feet.

4. Arcadia stores range in size from 748 square feet to 3300 square feet. The average size of each Arcadia store is

2022 square feet. 27 of these stores are greater than 1055 square feet and 3 stores are less than 1055 square feet.

5. Claire's has offered to license all stores in excess of 1055 square feet, on the condition BMI would not seek to license the Claire's stores with less than 1055 square feet. BMI has offered to Claire's a license to publicly perform all copyrighted musical compositions in the BMI repertoire. The annual cost of a license to cover all public performances of BMI music by Claire's stores would be $240 for the first location, and $45-$60 per location for each of the remaining locations that use music. Only one license agreement is necessary to cover all of Claire's music-using locations. For all the Claire's stores involved in this motion, the annual BMI licensing fee is $40,385, which is an average of $53.92 per store. These figures do not include any fees for licensing ASCAP compositions.

6. Claire's has not accepted and does not have a license to publicly perform any of the musical compositions to which BMI has been assigned the public performance rights.

7. Claire's had net sales of $168,674,000 during fiscal year 1990 and earned $13,402,000 in net income during the same period. Making up this total, Claire's Boutiques stores had net sales of $165,767,233 and earned $13,036,996 in net income during fiscal year 1990, and Arcadia stores had net sales of $2,906,767 and earned $365,004 in net income during the same period. Claire's Boutiques stores averaged $264,681 in net sales and $20,986 in net profits during fiscal year 1990. Arcadia stores, which were acquired by Claire's in October, 1989, averaged $126,381 in net sales and profits of $15,870 per store during the last quarter of fiscal year 1990 (which included the Christmas season).

8. Approximately 65 Claire's stores, which have opened since August 1990, do not have receivers, pursuant to a decision by Claire's management not to commence radio playing in new stores until there is a result in this litigation.

9. Claire's Boutiques and Arcadia stores normally receive radio broadcasts during all hours they are open by means of a Radio Shack Optimus STA-20 AM/FM, 5 watt, stereo receiver. Claire's uses the same radio receiver that it uses in each of its stores in Claire's warehouse in Wood Dale, Illinois. The warehouse is at least 10,000 square feet in size, and approximately 55 employees work there.

10. Since there are 23 Claire's Boutique stores in the Chicagoland area, it is likely that at least some play the same radio station simultaneously.

11. Claire's pays $103.96 for each receiver after deduction of a volume discount. The receiver has a list price of $129.95. In addition, Claire's purchases an indoor antenna for each receiver. Claire's pays $2.24 for each antenna, which has a list price of $2.97.

12. The receiver is connected via 18 gauge speaker wire to two Realistic Minimus 7 speakers which are 6 inches x 6 inches x 8 inches. Claire's pays $39.95 for each speaker after deduction of a volume discount. The speakers have a list price of $49.95 each. The speakers are designed to stand on a table or to be hung from a wall or ceiling.

13. At the rear of most stores, Claire's has a storage room separated from the selling area by a floor to ceiling partition wall that runs from one end of the store to the other end. There is a door that is closed to the public connecting the two areas. Approximately 20 stores have a closet instead of a storage room. There are no speakers in the storage room or closet.

14. The receiver is kept on a shelf in the storage room or closet. The receiver has two jacks for connection of speakers and does not have built in speakers. As such, outside speakers must be connected in order to audibly play music via the receiver.

15. The speakers in Claire's stores hang from the ceiling over the selling area of the store. Claire's stores have deco-

rative dropped ceilings with a grid composed of lights running just below the dropped ceiling. The stereo speakers are attached to the upper ceiling, from which they drop down to a point approximately 6 inches above the light grid.

16. General contractors install the speakers and speaker wiring used in Claire's stores at the time each store is built, pursuant to a carefully designed corporate policy. The speakers in Claire's stores are connected to the receiver by wiring that is concealed as much as possible in the ceiling in the sales area of Claire's stores.

17. Two individual pieces of speaker wire run from the speaker jacks in the back of the receiver up the partition wall and pass through a hole in the top of the partition wall. One strand is attached to a speaker that is hung from the ceiling in the rear corner of the selling area. This speaker is an average of 5–15 feet from the receiver. The other strand of wire runs above the dropped ceiling and is connected to the second speaker which is similarly hung from the ceiling at an average distance of 20–35 feet from the receiver.

18. Claire's is in the process of remodeling its stores. About two thirds are completed, and all will be remodeled by 1992. In some of the stores which have not yet been remodeled, the receiver is kept in the selling area behind the "cash wrap" counter.

19. The Arcadia stores subscribed to a commercial background music service prior to their acquisition by Claire's. Claire's discontinued the subscription approximately six months after it acquired the Arcadia stores. In addition, 24 Claire's Boutiques stores had a trial subscription to a commercial background music service. Claire's ended the trial subscription because its employees preferred listening to the radio.

20. Claire's owns the sound equipment used at each of its Claire's Boutiques and Arcadia stores. Claire's owns and operates at least 669 radio receivers and 1,338 speakers.

Claire's headquarters purchases sound equipment in bulk quantities. It orders 20–50 receivers per order and up to 300 speakers at a time to be installed in Claire's stores. When it buys in such large quantities, Claire's receives its sound system equipment at a 20–25 percent bulk discount. Claire's purchasing agent is responsible for supplying each store with stereo equipment. Each time a new Claire's store is built, Claire's ships it a radio receiver. Stereo receivers are a stock item furnished to each store as a matter of course based on a supply requisition form. When a receiver breaks, the store manager orders a replacement receiver for the store.

21. During the first seven months of 1990, Claire's purchased 100 receivers, 100 FM antennas and 600 speakers at a total cost of $33,792.51. In 1989, Claire's purchased 250 speakers, 50 receivers, 50 amplifiers, 50 tuners, 50 FM antennas and 50 spools of speaker wire at a cost of $20,113.15. In 1988, Claire's purchased 290 speakers and 150 receivers at a cost of $27,755.22. In 1987, Claire's purchased 227 receivers, 100 speakers, and speaker wire at a cost of $26,451.24. Therefore, in the four-year period between 1987 and July, 1990, Claire's purchased at least 1,240 speakers and 527 radio receivers, together with associated FM antennae and wiring at a total cost of $108,112.42.

BROADCAST MUSIC, INC., et al. CLAIRE'S BOUTIQUES, INC.

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Supreme Court, U.S.
FILED
APR 9 1992
OFFICE OF THE CLERK

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No. 91-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

vs.

CLAIRE'S BOUTIQUES, INC., d/b/a CLAIRE'S BOUTIQUES, and d/b/a ARCADIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 9, 1992

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly rejected petitioners' novel legal theory that individuals or corporations which own more than one retail establishment are ineligible for the statutory exemption contained in 17 U.S.C. §110(5) which permits retailers to play home-type radios in their stores without the need for a public performance license?

2. Whether the Seventh Circuit correctly ruled that a store's eligibility for the statutory exemption contained in 17 U.S.C. §110(5) should be judged by applying the explicit language of the statute, rather than policies expressed in legislative history but not incorporated within the language of the statute?

3. Whether the Seventh Circuit correctly ruled that "further transmission" by a retailer which exceeds the scope of the exemption contained in 17 U.S.C. §110(5) must entail more than simply connecting a receiver to two speakers by means of speaker wire run through a wall?

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No. 91-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

vs.

CLAIRE'S BOUTIQUES, INC., d/b/a
CLAIRE'S BOUTIQUES, and d/b/a ARCADIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement Of Case

This case arises from an aggressive attempt by petitioners to dramatically expand the scope of their licensing of public performances of musical compositions through judicial amendment of one section of the copyright law. 17 U.S.C. Section 110(5) exempts retailers from the obligation of obtaining licenses for the public performance of radio broadcasts received in stores as long as each reception is made by a single receiving apparatus of a kind commonly found in the home, no charge is imposed

by the retailer and there is no further transmission. Petitioners initiated this action to obtain a judicial declaration that any company which operates retail stores in more than one location is ineligible for the 17 U.S.C. §110(5) exemption since it would operate more than "a single receiving apparatus".

Prior to the commencement of this action, no court had ever considered the issue as to whether common ownership of more than one commercial establishment precluded application of the §110(5) exemption. Indeed, neither BMI nor any other performing rights society had ever asked a court to accept such an interpretation prior to this case. Thus, it is extremely disingenuous for BMI to suggest that the Seventh Circuit's rejection of this novel legal theory presents a conflict among the courts or presents issues warranting the issuance of a writ of certiorari by this Court.

On July 12, 1990, Broadcast Music, Inc. ("BMI") served a complaint upon Claire's Boutique's, Inc. ("Claire's") alleging 88 counts of copyright infringement arising out of Claire's use of home-type stereo equipment to receive radio broadcasts in its stores. Claire's filed its answer on September 5, 1990 interposing two counterclaims, one of which sought a judgment declaring Claire's exempt from licensing requirements pursuant to 17 U.S.C. §110(5). The parties agreed to stipulated facts (App. D and E) and presented the case to the District Court on joint motions for summary judgment.

By decision dated December 28, 1990 the United States District Court for the Northern District of Illinois, Rovner J., rejected BMI's claims of copyright infringement and held that Claire's stores are exempt from licensing requirements under the terms of 17 U.S.C. §110(5). After careful analysis, the District Court held that the single receiving apparatus operated in each of Claire's stores was "of a kind commonly used in private homes," and that there was no further transmission of the broadcast. Accordingly the Court ruled that Claire's conduct did not constitute copyright infringement.

BMI appealed to the Seventh Circuit Court of Appeals, which affirmed Judge Rovner's decision on December 11, 1991. The

Seventh Circuit applied the tests set forth in §110(5) and agreed with Judge Rovner that each Claire's store received broadcasts on a single receiving apparatus of a kind commonly used in private homes and did not further transmit the broadcast.

Further, the Seventh Circuit rejected BMI's contention that chains or commonly owned stores are automatically outside of the exemption because, in the aggregate, they operate more than one receiving apparatus. The Seventh Circuit held that §110(5) looks only to the area where a single work is performed and thus looks only to the individual store in determining whether the "single receiving apparatus" test is met.

BMI apparently selected Claire's as a test case for its novel legal interpretation of "a single receiving apparatus" because BMI believed that Claire's was not a small business and therefore not eligible for the §110(5) exemption. It is undisputed that §110(5) does not contain any references to small businesses or the financial size or corporate structure of ownership. It is similarly undisputed that the legislative history of this section contains references to a desire to exempt small businesses from licensing requirements. Several courts, in explaining decisions compelled under the language of §110(5), have referred to this legislative history as indicative of congressional intent.

In its initial papers to the District Court, Claire's contended that, on an individual store-by-store basis, it was a small business which qualified for the exemption. However, Judge Rovner, and subsequently the Seventh Circuit, ruled that policy statements contained in legislative history were irrelevant to the issues presented by this litigation. Since those congressional statements were not enacted in the statute and were not necessary to understand ambiguous statutory provisions, they had no bearing on the issues posed by this litigation.

Both the District Court and the Seventh Circuit recognized that Congress chose to draft the text of the exemption in terms of the type of radio equipment used to receive the broadcast and the nature of the transmission, and not the financial condition or size of the business. Both Courts refused to elevate

references to small businesses in the legislative history to independent supplemental tests which could change determinations compelled by the standards set forth in the statute.

1. The Parties

Respondent Claire's Boutiques, Inc. operates a chain of retail stores under the names Claire's Boutiques and Arcadia. (App. 55a, ¶2).

The average size of each Claire's Boutiques store is 861 square feet. (App. 27a) Claire's Boutiques stores averaged $264,861 in net sales and $20,986 in net profits during fiscal year 1990. (App. 27a)

The average size of each Arcadia store is 2022 square feet. (App. 27a) Arcadia stores averaged $126,381 in net sales and $15,870 in net profits during the last quarter of fiscal year 1990, which included the Christmas shopping season. (App. 27a)

Petitioner Broadcast Music, Inc. ("BMI") is a performing rights licensing representative that licenses approximately one and one-half million copyrighted musical works. (App. 51a, ¶2). While BMI repeatedly cites its status as a non-profit organization seeking to reward the creativity of songwriters, BMI competes with other performing rights societies and its performance is measured by revenues generated. Accordingly, BMI sets revenue goals, devotes substantial energy to devising ways to increase revenues and places certain employees on commission programs which depend on the volume of licenses generated.

2. Claire's Receiving Apparatus

Each Claire's store receives radio broadcasts during store hours by means of a single Radio Shack Optimus STA-20, AM/FM stereo receiver. (App. 27a) The receiver has a list price of $129.95 and delivers only

5 watts of power, far less than many sold for private use. (App. 57a) It also sells for a price lower than many receivers sold for private use. (App. 36a) The receiver used by Claire's is not integrated with public address systems, telephone lines or other stereo equipment. It plays only unaltered radio broadcasts. (App. 38a) The manager of each individual store independently determines which radio broadcasts will be heard in the store.

The receiver has two jacks for connection of no more than two speakers and does not contain built in speakers. (App. 57a) As a result, two external speakers must be connected to the receiver by use of speaker wire in order for the receiver to function. (App. 27a)

The receiver is kept on a shelf in the storage room or closet and is connected by speaker wire to two Realistic Minimus 7 speakers which measure 6 inches x 6 inches x 8 inches. (App. 28a) The speakers have a list price of $49.95 each, and are designed to sit on a table or hang from a wall or ceiling. (App. 28a) The speakers are small and are clearly designed for private home use. (App. 36a)

The two speakers hang from the ceiling over the selling area of each store (App. 28a), and no speakers are located in the storage room or closet, or anywhere else on the premises. (App. 57a, ¶¶13, 15) One speaker is located between 5 and 15 feet from the receiver and the other speaker is located between 20 and 35 feet from the receiver. (App. 58a, ¶17) Claire's stores have decorative dropped ceilings, with a grid composed of lights running just below the dropped ceiling. (App. 28a) The two speakers hang from the dropped ceiling and drop down to a point approximately 6 inches above the light grid. (App. 28a) They are not "recessed", as alleged in the Petition.

> Each speaker is connected to the receiver by a strand of speaker wire that runs from the speaker above the dropped ceiling through a small hole into the storage room or closet and along the exterior of the wall to the shelf where the receiver is located. The speaker wire is then connected to the back of the receiver. (App. 29a)

I. REASONS FOR DENYING THE WRIT

Respondent respectfully requests that this Court decline to issue a writ of certiorari to review the decision of the Seventh Circuit. The Seventh Circuit's interpretation of "single receiving apparatus" is not inconsistent with the interpretation of any other circuit or of the plain meaning of the statute.

The decisions of the District Court and Seventh Circuit are based on the clear statutory language of §110(5). Application of the statutory tests and reasoning applied by the Seventh Circuit would not compel a contrary result in any previous district or circuit court decision. Indeed, the uniformity sought by petitioners can best be provided by adherence to statutory tests rather than by supplementing them with subjective, undefined policy statements contained in congressional debates and committee reports.

II. ARGUMENT

A. The Seventh Circuit's Rejection Of Petitioners' Novel Interpretation Of A "Single Receiving Apparatus" Was Correct And Proper.

In no prior case has BMI or any other performing rights society ever argued that mere ownership of multiple retail establishments precluded application of the §110(5) exemption. Indeed, in numerous cases decided by circuit and district courts in favor of the performing rights societies under §110(5), no court ever discussed whether multiple ownership of retail establishments precluded application of the statutory exemption. Since BMI's definition of a "single receiving apparatus" would have been dispositive of many of these cases, the absence of any discussion on the issue was not coincidental. Instead, it reflected the fact that no party considered

the term to be ambiguous or to contain any reference to common ownership of separate retail establishments. Rather, the exemption was interpreted in terms of the type of equipment utilized by each retail establishment. Accordingly, BMI's assertion that the Seventh Circuit's decision constitutes a radical departure from an unbroken line of precedent is simply false. Indeed, it is BMI that seeks a radical departure from prior decisions when it asserts preclusion of any application of §110(5) to multi-store operations.

Not surprisingly, the four pages of BMI's petition (pages 13-17) which address the "single receiving apparatus" argument fail to cite a single case or even any legislative history. Rather, BMI attempts to defend its new definition in two ways.

First, it asserts that the statute's failure to say "single receiving apparatus at a single geographic location" compels the conclusion that the issue of location was debated and rejected by Congress. Claire's submits that there is no reason to assume that the failure to include language concerning a "single geographic location" was discussed by Congress. Rather, it is logical to infer that Congress intended that the exemption be analyzed with respect to separate performances. Thus, the single receiving apparatus in §110(5) refers to the equipment responsible for each performance and does not address separate, independent performances by the same owner.

Second, BMI asserts, without any factual basis, that "very few, if any retail establishments would use two receivers to receive the same transmission at the same location." Not only is this statement factually unsupported, it is meaningless. Even if a statutory test proves of limited utility, it may not be subsequently reinterpreted by the courts to give it a meaning uncontemplated by anyone for thirteen years following the passage of the Act.

Recognizing the futility of defending its novel and creative definition of a "single receiving apparatus", BMI constructs a tortured reading of the Seventh Circuit's decision from which it erroneously suggests that the Seventh Circuit has imposed new, improper tests upon the copyright owner to disprove the §110(5) exemption.

The simple fact is that the Seventh Circuit ruled that the "single receiving apparatus" test applies to each retail operation and not to its owner. No tests or burdens were imposed on the copyright owner. The Seventh Circuit decision does not require, as petitioners allege, "that a copyright owner must now establish that a music user is acting like a broadcaster and receiving more than minimal benefits from the infringement." Rather, as in all previous decisions, the Seventh Circuit imposed on Claire's the burden of demonstrating that it receives regular radio signals on a single receiving apparatus of a kind commonly found in the home without charge or further transmission. The Seventh Circuit went beyond the facts of this case in its analysis of a "single receiving apparatus". It anticipated that there might be circumstances, not presented by this case, which might permit a finding that common ownership of more than one retail establishment might violate the "single receiving apparatus" test. Specifically, the Court indicated that if a retailer transmitted the same broadcast to each of its stores or directed managers to tune to a particular station, it might be operating more as a broadcaster than a retailer and thus might not satisfy the statute. However, that discussion was hypothetical and discussed issues beyond those presented by this case.

BMI's rationale for misinterpreting the Seventh Circuit is obvious. BMI would like to suggest that the Seventh Circuit is engaged in improper judicial activism by effectively redrafting the legislation. However, the Seventh Circuit has rigorously interpreted that statute as drafted and has rejected attempts at judicial legislation utilized by other courts in interpreting this statute.

As with other issues presented in this case, BMI's argument raises issues addressed to legislative draftsmanship and not to judicial interpretation. Congress decided to draft the test in terms of the type of equipment and transmission used by each retail establishment. If a retail establishment uses a single receiving apparatus and uses equipment commonly found in the home and does not further transmit that broadcast, it is exempt under the statute. If BMI believes that such a statutory scheme does

not adequately address the concerns discussed by Congress, its remedy lies with Congress and not with the courts.

The fact that BMI's true concerns are legislative, not judicial, is evidenced by the frequent policy arguments it cites. Protection of creativity and potential revenue losses are not appropriate considerations for judicial review of the statute. Moreover, the practical anomalies generated by the interpretation advocated by BMI further evidence the need for legislative debate on these issues. Under BMI's interpretation, two corner newsstands owned by the same individual which generate minimal revenue would still be outside the scope of the exemption due to common ownership. Further, stores in the same shopping mall with identical products, revenues, size and stereos may have different licensing requirements depending upon on whether one is a member of a chain and one is a sole proprietorship. These are all issues to be decided by Congress and not by the courts. Congress has decided to define the scope of the exemption by looking at the type of equipment used for each broadcast. Accordingly, the use of multiple receivers or multiple sets of speakers at each location or augmentation by paging or public address systems would take the operation outside the scope of the statute.

The statute must be interpreted as drafted. As noted above, no previous court has ever accepted (or even considered) the interpretation of a "single receiving apparatus" being advocated by BMI. Accordingly, the Seventh Circuit's refusal to accept BMI's proposed definition is hardly a departure from precedent, but rather a decision consistent with the statutory language and prior decisions.

B. The Seventh Circuit Properly Refused To Consider Factors Contained In The Legislative History But Not Enacted Into The Statute

In commencing this action, petitioners believed that they had a safe fall-back position in that even if their novel definition of "single receiving apparatus" was rejected, Claire's would still be ineligible for the exemption because it was not a small

business. The District Court and the Seventh Circuit rejected this argument as well, however, deciding that

> Congress chose to effectuate (the intent to exempt small commercial establishments) by drawing a distinction based on the type of sound equipment utilized in the nature of the transmission.

In addition, the Seventh Circuit went on to note that

> Any rule developed under §110(5) based on the financial strength of the company seeking the exemption would be directly contrary to the terms of the statute. The statute speaks only of 1) the number of receiving apparatuses used, 2) whether the sound system is of a type commonly used in private homes, 3) whether music is further transmitted, and 4) whether admission was charged. Legislative history cannot be used to invent rules totally unrelated to the language of the statute. It is appropriate instead for the purpose of clarifying an ambiguous statute or, what is often the same thing, applying the statute to a situation not clearly foreseen by the drafters of the statute. *In re Sinclair* 870 F.2nd 1340 (7th Cir. 1989).

The Seventh Circuit conceded that certain court decisions have specifically applied "small business" or "background music" tests extrapolated from the legislative history of the statute. However, as the Seventh Circuit stated, these cases relied independently on an analysis of the stereo system that was installed in the store. The two circuit court cases* referred to in petitioners' submission to this Court are indicative of this approach. In *Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2nd 816 (9th Cir. 1982), the Court held that defendant failed to qualify for the exemption because the store had a commercial system with

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* While petitioners also refer to *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd.* 855 F. 2nd 375 (7th Cir. 1988), the only issue on appeal was the imposition of damages for willful infringement. Given the fact that the receiver in *Kowalczyk* had paging capacity and was connected to eight speakers located in different rooms, it clearly violated the statute.

widely separated speakers of a type not commonly found in the home. In *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y. 1981), *aff'd* 668 F.2nd 84 (2nd Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) the Court considered the type of stereo transmission utilized by the defendants and concluded that four to seven speakers recessed behind wire grids over a very large area was not indicative of a stereo system of a type commonly found in the home, and that defendants engaged in further transmission of the communication.

In addition, the Seventh Circuit noted that the district court decisions relied on by BMI similarly did not rest solely on the defendant's size, revenue or ability to subscribe to a background music system. In *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D.Pa. 1985), the owner of the stores connected the receivers to microphones and amplifiers, mounted speakers throughout and outside of the stores, and placed most of the speakers 150 feet from the receivers. The systems also featured public address capabilities. In *Lamminations Music v. P&X Markets Inc.*, 1985 Copyright L.Dec. (CCH) 19,555 ¶25, 790 (N.D.Cal. 1985) the stores involved were grocery stores which had stereo systems adapted to the size of each store, with anywhere from six to ten ceiling mounted speakers which were widely separated from the receivers. In *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990), the defendant had a system which included a cassette deck and five recessed ceiling speakers with speaker wire twice as long as Claire's. In addition, the system had originally been designed as a public address system. In *Gnossos Music v. DiPompo*, 13 U.S.P.Q. 2nd 1539 (D.Maine 1989), the defendant restaurant owner had connected the stereo in the lobby to eight to ten recessed speakers which transmitted music throughout the various dining rooms and the lobby.

BMI places undue reliance on the anomalous case of *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Texas 1988). However, that case involved a system with unfinished speakers spaced 30 feet apart and 40 feet from the receiver which were hidden inside ceiling grills and over which music had formerly been transmitted by a background music service.

A proper use of legislative history and rejection of a rule based on the financial strength of the defendant would not produce a different result in any of the cases cited by BMI. In fact, rejection of a rule based on the financial strength of the defendant provides some consistency and some adherence to a rule of law as it is based upon the tests actually imposed by Congress, rather than on congressional debates and reports that took place prior to enactment of the statute.

Ultimately, it is not surprising that BMI argues policy issues and describes the millions of dollars which will allegedly be lost as a result of the Seventh Circuit's decision and the potential impact on songwriters and publishers from this loss of revenue. However, the Copyright Law reflects a balancing of interests. It reflects an interest in compensating creativity, but also reflects an interest in protecting incidental uses of music from undue governmental interference and taxation. With regard to the playing of radio broadcasts by a retailer, Congress decided to define the line in terms of the stereos used by the retailers. Judicial incorporation of a "small business" or "background music" test would not only needlessly amend the clear language of the statute but would require courts in the future to make differentiations on the basis of gross revenues, square footage and commercial operations without any assistance from Congress in deciding the appropriate dividing lines.

Claire's submits that the Seventh Circuit's decision does not conflict with congressional intent. Indeed, on a store-by-store basis, Claire's playing of radio broadcasts is precisely the type contemplated as being exempt by Congress. Claire's are small individual stores with simple home-type equipment. The fact that each Claire's store is part of a commonly owned chain operation does not change the nature of each store's operation or the nature of the transmission. Indeed, in many shopping malls, Claire's faces competition from sole proprietorships operating similar stores. The rule advocated by BMI would require Claire's to pay licensing fees while exempting such sole proprietorships from similar requirements, even if they have similar or greater square footage or revenues on a store-by-store basis.

C. The Seventh Circuit Correctly Held That Claire's Does Not Further Transmit Radio Broadcasts

Both the District Court and the Seventh Circuit correctly held that adoption of BMI's definition of further transmission would eviscerate the exemption. (App. 27a) It is simply illogical to argue that a speakerless radio receiver hooked up to two speakers can constitute further transmission of radio broadcasts. Under such an interpretation, no radio reception could ever be exempt once speakers were attached to the receiver to make the broadcast audible.

Moreover, the Seventh Circuit correctly rejected BMI's assertion that the placement of the receiver in a back room separate from the selling area creates a further transmission. (App. 24a) The Seventh Circuit recognized that "the nature of the transmission" does not change simply because the speaker wire happens to pass over or through a wall on its way to the speakers. (App. 24a)

BMI's assertion that the Seventh Circuit radically departed from an unbroken line of precedent is belied by these precedents. Starting with *Buck v. Jewell-LaSalle Realty*, 283 U.S. 191 (1931) and continuing in *International Korwin Corp. v. Kowalczyk*, *supra*, and *Gnossos Music v. DiPompo*, *supra*, courts have attempted to preclude proprietors from funneling radio broadcasts from one location to a number of different locations by means of numerous speakers. In both *Kowalczyk* and *Gnossos Music* broadcasts were piped from one receiving location to various dining rooms in such a manner that several transmissions of the original signal occurred.

In recognition of the above, the Seventh Circuit held that further transmitting a performance must entail "the use of some device or process that expands the normal limits of the receiver's capabilities". (App. 24a) The Seventh Circuit correctly recognized that none of the precedents cited by BMI relied solely on their finding of further transmission. (App. 24a, 25a) In all of the cases cited by BMI, the act of piping music into a number of rooms required the use of numerous speakers and extensive

wiring, which act by itself made the receiving apparatus not of the kind commonly found in the home.

Finally, the Seventh Circuit correctly noted that if Congress had wanted to impose a rule requiring speakers to be in the same room as the receiver it could have so provided in the statute. Once again, the Seventh Circuit rejected BMI's attempt to impose new rules that do not exist in the statute. Contrary to BMI's assertion, there is no need for this Court to review the Seventh Circuit's holding that Claire's did not further transmit radio broadcasts. Indeed, this is hardly the type of issue warranting Supreme Court review. The Seventh Circuit's decision is consistent with prior precedent and is the only logical application of the rule.

CONCLUSION

This Court should decline to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit since that judgment is consistent with the language of the relevant statute and is not inconsistent with prior decisions interpreting 17 U.S.C. §110(5). Further, petitioners' request is essentially legislative and does not belong on the docket of this Court.

Respectfully submitted,

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No. 91-1437

IN THE
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BROADCAST MUSIC, INC., *et al.*,

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CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES,
and d/b/a ARCADIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Despite Claire's efforts to the contrary, its brief highlights the reasons why a writ of certiorari should be granted. The need for this Court to resolve the three-fold conflict—among the circuits, with Congressional intent, and with the plain language of the statute—is clear.

I. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "SINGLE RECEIVING APPARATUS" REQUIREMENT CONFLICTS WITH PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

Petitioners do not argue, as asserted by Claire's, that "mere ownership of multiple *retail establishments* preclude[s] application of the Section 110(5) exemption." Claire's Brief at 6 (emphasis added). Rather, Petitioners assert, and precedent, Congressional intent, and the statutory language confirm, that ownership of 669 *receiving apparatuses* by a multimillion dollar chain store operation precludes application of the Section 110(5) exemption.

A. Precedent Mandates That Claire's Activities Must Be Examined As a Whole.

The Seventh Circuit (and later the Eighth Circuit in *Edison Brothers* for which a simultaneous petition for a writ of certiorari is pending with this Court) held that the analysis of whether the Section 110(5) exemption applies "should be limited to the area where a single work is performed" (App. 14a) rather than by focusing upon the infringer's activities as a whole. But every prior decision, including those of both the Second and the Ninth Circuits, has interpreted the Section 110(5) exemption to apply to the activities of an alleged infringer as a whole, not to each location or receiver in isolation.

In *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923, 925 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84, 85-86 (2d

Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), the Second Circuit affirmed the district court's approach in analyzing The Gap's entire chain store operation, even though specific infringements were alleged to have occurred at only two stores. Similarly, the Ninth Circuit held that the "size and nature" of the Casual Corner chain precluded the application of the Section 110(5) exemption to every store in that chain, even though the alleged infringements occurred in only three stores. Indeed, the Ninth Circuit affirmed the district court's injunction against *all* Casual Corner stores. *Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816, 817 (9th Cir. 1982).

Every prior district court decision also examined an infringer's activities as a whole, *i.e.*, its use of music throughout a chain operation, where the alleged infringements occurred at only a few stores of a larger chain. None of the judges in these cases looked at individual stores in isolation. *See Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790 (N.D. Cal. 1985); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D. Pa. 1985); *see also* BMI's Petition at 9 for a discussion of these cases.

Thus, the Seventh Circuit's decision conflicts with every prior circuit and district court decision which examined whether an infringer's entire scope of activities surrounding the use of copyrighted music must be analyzed in the aggregate, instead of piecemeal, in order to correctly determine if the infringer was entitled to the Section 110(5) exemption.

It is the Seventh Circuit, not Petitioners, that devised a novel definition of "a single receiving apparatus." Claire's Brief at 6-7. "Single" has only one definition; it means "one." The conclusion that each receiving apparatus should be examined separately to determine if it satisfies the "single receiving apparatus" test would mean that every receiving apparatus *automatically* meets the test. Therefore, "single" means single *per user*, not per location. The Sev-

enth Circuit's ruling that "the 'single receiving apparatus' test applies to each retail operation and not to its owner" (Claire's Brief at 8) is contrary to the statutory language and every other interpretation of Section 110(5).[1]

B. The Seventh Circuit Has Written A New Test Into The Statute.

The Seventh Circuit's "broadcaster" test conflicts with the plain meaning of the statute. It is Claire's that makes a "tortured" reading of the Seventh Circuit's decision to argue that the Seventh Circuit has not imposed a new test. Claire's Brief at 7-8. The Seventh Circuit expressly held that "unless Claire's acted like a broadcaster, the analysis must be limited to the single business site where the receiving apparatus operates." App. 15a n.10. No basis exists in the statute, legislative history, or precedent, for the conclusion that Claire's activities should be considered as a whole only if the copyright owners demonstrated that Claire's acted like a broadcaster. The Seventh Circuit's newly created "broadcaster" test conflicts with the express language of the statute, precedent, and Congressional intent. The Seventh Circuit's decision permits unlicensed use of copyrighted music to an extreme that neither any prior court nor Congress found warranted.

II. THE SEVENTH CIRCUIT'S REJECTION OF THE "SMALL BUSINESS" AND "COMMERCIAL BACKGROUND MUSIC SERVICE" TESTS CONFLICTS WITH EVERY PRIOR DECISION AND CONGRESSIONAL INTENT.

Claire's dismisses the "small business" and "commercial background music service" tests as if there is no basis for

[1]While prior courts had not squarely addressed the definition of single receiver, but rather had looked to the size of the defendants' business as a whole, none of these courts, in the 13 years between the effective date of the 1976 Copyright Act and the *Claire's* decision, had extended the Section 110(5) exemption to any person or company operating more than one unlicensed receiver.

these tests. *See* Claire's Brief at 9-12. In fact, every prior decision confirms, and even the Seventh Circuit itself admits, that Congress intended to limit the exemption to small businesses. The legislative history, which this Court has found to be important in numerous other interpretations of the Copyright Act, indisputably expresses Congress' intent to preclude multimillion dollar chain store operations, like Claire's, from the Section 110(5) exemption. *See* BMI's Petition at 10-12.

Numerous cases have relied on the small business and commerical background music service tests in determining the applicability of Section 110(5). *See* BMI's Petition at 10-12 and the cases cited in n.5.[2] These tests are not simply "policy issues." Every prior decision relied on them because of Congress' express intent that Section 110(5) exempt only small businesses. Neither Claire's nor the Seventh Circuit dispute this intent. Ironically, it is only now, after Claire's has succeeded in the district and circuit courts, that Claire's rejects these tests as improper use of legislative history. Indeed, Claire's admits that in its memorandum in support of its motion for summary judgment, it relied heavily upon these tests as proof that Claire's did satisfy the requirements of the Section 110(5) exemption. *See* Claire's Brief at 3.

Moreover, precedent have consistently held that these tests constitute independent grounds for determining the applicability of Section 110(5). *See* BMI's Petition at 11 and the cases cited in n.5. An alleged infringer must be a small business for the Section 110(5) to apply, regardless of the type of receiving apparatus it uses. Rejection of these independent grounds constitutes an irreconcilable conflict with other circuit and district courts that can only be resolved by this Court.

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[2]BMI does not place, as Claire's asserts, "undue reliance" on *Bill Miller's Bar-B-Q*. Claire's Brief at 11. Indeed, that case just represents one decision in a long line of precedent attesting to the importance of the small business and commercial background music service tests. It is not an anomaly. *See* BMI's Petition at 11-12 n.5.

III. THE SEVENTH CIRCUIT'S DEFINITION OF FURTHER TRANSMISSION CONFLICTS WITH AN UNBROKEN LINE OF PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

The definition of "further transmission" that Claire's criticizes as "BMI's definition" (Claire's Brief at 13) is the definition mandated by Section 110(5)'s statutory language, espoused by every prior decision, and confirmed by the legislative history.

According to the statute, a "further transmission" occurs when a communication of a performance is sent beyond the place where it is initially received. 17 U.S.C. § 101; *see also* BMI's Petition at 18-19. Every prior decision addressing the matter holds that a further transmission occurs when a radio broadcast is received in one room and then transmitted to another room. *Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. at 1176; *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657, *aff'd*, 855 F.2d 375, 378 (7th Cir. 1988). The legislative history confirms this definition in its statement that the Section 110(5) exemption does not apply where a broadcast is "further transmitted beyond the place where the receiving apparatus is located." H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 87, *reprinted in*, 1976 U.S.C.C.A.N. 5659, 5701.

Some courts have adopted an even broader interpretation, *i.e.*, *any* dispersal of a radio broadcast through a commercial establishment constitutes further transmission. *Sailor Music*, 516 F. Supp. at 925, *aff'd per curiam*, 668 F.2d 84; *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990); *Hampshire House Publishing Corp. v. Sal & Sam's Restaurant, Inc.*, 1985 WL 9451 (E.D. La. 1985); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991); *see also* BMI's Petition at 20-21 for a discussion of these cases.

Claire's tries to bolster the Seventh Circuit's radical departure from the well-settled definition by arguing that the Sev-

enth Circuit adopted Claire's definition, *i.e.*, that further transmission occurs upon "funneling radio broadcasts from one location to a number of different locations by means of numerous speakers."[3] Claire's Brief at 13. The Seventh Circuit not only failed to adopt Claire's unprecedented definition, it never even mentioned it. Rather, the Seventh Circuit said that further transmission requires "the use of some device or process that expands the normal limits of the receiver's capabilities." App. 24a. In so doing, the Seventh Circuit created its own definition contrary to precedent and the accepted meaning of that phrase.

Finally, even Claire's admits that the Seventh Circuit's definition merges the home-type and the further transmission requirements. Claire's Brief at 13-14. Under the Seventh Circuit's definition, every receiving apparatus that further transmits also automatically fails the home-type requirement. If one can "further transmit" only by technically enhancing a home-type receiver, that receiver will no longer be "home-type." Therefore, the Seventh Circuit's definition eliminates the further transmission prohibition.

IV. FAILURE TO GRANT A WRIT OF CERTIORARI WILL ADVERSELY AFFECT MANY SONGWRITERS AND PUBLISHERS.

If the Seventh Circuit's decision goes unreviewed, many songwriters and music publishers will be harmed. The Copyright Act, previously uniform and predictable, will apply differently depending upon the Circuit in which the infringing activities occur, and the remuneration that songwriters and publishers receive for their creativity will decrease.

Who will instead benefit will be the multimillion dollar chain store operations that exploit music for commercial benefit without compensating the creators of that music. When Congress sought to balance the public good with the

[3] This contention that "to further transmit" means sending a broadcast from one room to several rooms, is not supported by any precedent, legislative history, or the statute itself.

right of copyright owners to be paid for their music when performed on the radio in a commercial establishment, it focused upon the mom-and-pop store where the proprietor merely turned on a simple radio, at least in part for his own enjoyment. From this justified narrow exemption, judicially recognized for over a decade, the Seventh Circuit has fashioned an interpretation that allows national chain operations to use massive amounts of copyrighted music for their commercial purposes. In its decision, the Seventh Circuit breaks the Congressional balance apart. That result is not what the Section 110(5) exemption provides.

CONCLUSION

For the foregoing reasons, and for those stated in BMI's Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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